(27,062)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

	Original.	Print
Caption	1	1
Complaint	2	1
Affidavit of C. S. Dupuis	11	6
Order to show cause	15	8
Alternative writ of mandamus	17	9
Answer and return of Hines, Director General	20	10
Separate answer of N. P. Ry. Co	30	16
Order for peremptory writ of mandamus	34	18
Opinion of the court, by Birdzell, J	35	18
Concurring opinion of Robinson,, J	55	34
Dissenting opinion of Grace, J	60	37
Dissenting opinion of Bronson, J	73	45
Judgment	106	66
Assignment of errors	107	66
Petition for writ of error	109	67
Bond on writ of error	111	68
Writ of error	114	69
Citation and service	115	70
Return to writ of error	117	71

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1 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Complaint.

William Langer, Attorney General, Attorney for Plaintiff.
Frank E. Packard, Counsel for Plaintiff.

2 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Complaint.

The State of North Dakota, upon the relation of William Langer, Attorney General, alleges and shows to the court:

I.

The relator, William Langer, is now and has been for more than two years last past, the duly elected, qualified and acting Attorney General of the State of North Dakota.

II.

Defendant is and for many years last past has been a railroad corporation, created and existing under and by virtue of the laws
3 of the state of Wisconsin, and is a citizen and resident of said state; that for many years last past it has owned and operated a system of railroad lines (with branches) having their eastern termini at Ashley, Wisconsin and St. Paul and Minneapolis, Minnesota, and extending westerly from said termini through the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon to Puget Sound and Pacific coast ports; that defendant's lines of railroad extend through or into each of the counties of Barnes, Benson, Billings, Burleigh, Cass, Dickey, Dunn, Eddy, Emmons,

Foster, Golden Valley, Grand Forks, Grant, Griggs, Hettinger, Kidder, La Moure, Logan, McLean, Mercer, Morton, Oliver, Pembina, Ransom, Richland, Sargent, Sheridan, Sioux, Stark, Stutsman, Walsh and Wells, in the State of North Dakota, and during all of the time aforesaid defendant has been engaged in the transportation of commerce, both state and interstate, and its through lines have been and now are instrumentalities of interstate commerce.

III.

Defendant, Walker D. Hines, is now and has been for some time last past, the duly appointed, qualified and acting Director General of the railroad administration of the United States; that by virtue of an act of Congress of August 29th, 1916 (a so-called "rider" attached to the army appropriation bill of that year), and by the provisions of an act of Congress of March 21st, known as the "Federal Rail Control Act," and by virtue of a proclamation of the President of the United States of December 26th, 1917, said Walker D.
4 Hines, and his predecessor in office, Wm. G. McAdoo, are now, and have been since the first day of January, 1918, in possession and control of all the property of said railroad companies and have controlled, operated and supervised the railroad systems of the United States and have performed the duties imposed upon them by said acts of Congress and said proclamation of the President of the United States; that said William G. McAdoo and Walker D. Hines have exercised such possession and control through this defendant railroad company and its officers and directors, and said Walker D. Hines is now in possession and control thereof, exercising his power of supervision and control over the said company and its officials and directors, over the intrastate as well as the interstate business of said company in the State of North Dakota.

IV.

By an act approved March 6th, 1885, a board known as the "Board of Railroad Commissioners" was created by the legislative assembly of Dakota territory. Upon the adoption by the state of a constitution in 1889, Section 82 provided for the election of three commissioners of railroads who should maintain offices at the seat of government and whose term of office should be two years. The powers and duties of the Board of Railroad Commissioners was defined by the act of March 6th, 1885, and have since been amplified from time to time, both by the territorial and state legislative assemblies, up to and including the 1919 assembly. For nearly thirty-four years it
5 has exercised supervision and control over the systems of railroads operating lines in, into and and through the state of North Dakota, both as to intrastate rates and service.

Article 21 and other provisions contained in the Revised Code of North Dakota for 1913 defines the powers and duties of the Board of Railroad Commissioners pertaining to the regulations of common carriers. Sections 4725 provides that no railroad corporation may

change its fares, rates and charges for services without first filing such schedule of fares, rates and charges with the Board of Railroad Commissioners; that at the present time and continuously since March 6th, 1885, the said Board of Railroad Commissioners has exercised supervision and control over the railroads operating within the state of North Dakota in compliance with the powers conferred upon them by said Article and Section and other acts of the legislative assembly, and have required said companies to file schedule of fares, rates and charges at their offices in the state capitol at Bismarck before such rates and charges became effective.

V.

In compliance with the provisions of law set forth in Paragraph IV herein, the defendant railroad company had therefore filed a schedule of fares, rates and charges and said schedule of said defendant railroad company was on file with said Board on May 26th, 1918; there has been no petition or complaint filed with said Board of Railroad Commissioners since said date by said company, asking for an increase in either freight rates or passenger fares and
6 charges within the State of North Dakota.

VI.

On May 25th, 1918, Wm. G. McAdoo, Director General of the United States Railroad Administration, issued General Order No. 28, whereby he directed the railroads of the United States to put into force and effect on June 25th, 1918, certain passenger fares and baggage charges, and on June 10th, 1918, certain freight rates; said passenger and freight charges and rates were greatly in excess of the rates then prevailing in the State of North Dakota, being not less than an increase of 25% in freight rates and an increase of from two and one-half cents to three cents per mile, for passenger fares; such fares, rates and charges were put into effect on the dates above named without first filing with the Board of Railroad Commissioners, as provided by Section 4725 of the Revised Code of 1913, ten days in advance thereto, a schedule of such fares, rates and charges; that such Schedule of fares, rates and charges has been filed with the Board of Railroad Commissioners as a matter of courtesy for the use and information of said Board and not in compliance with said Section 4725; said General Order No. 28 and the exhibit attached thereto is hereby attached as Exhibit A and is a part of this complaint.

VII.

That said order of May 25th, 1918, of said Wm. G. McAdoo, which put into full force and effect in the state of North Dakota, on the 10th and 25th days of June respectively, the schedule of rates and charges therein contained, was unauthorized by and contrary
7 to the acts of Congress of August, 29th, 1916, and March 21st, 1918, and the proclamation of the President of the

United States of December 26th, 1917; that none of said rates prescribed in said order affected the government transportation of troops, war materials or government supplies, nor did they affect the issue of stocks and bonds by defendant railroad company and in no way affected the government of the United States in the prosecution of the present war.

That said Director General of the United States Railroad Administration and the defendant company assumed to act under and by virtue of said acts of Congress giving authority to the President of the United States to take possession and assume control and operation of the railroad systems of the United States; that said act does not authorize the defendants or any federal authority whatsoever, either to initiate or put into effect rates or charges or any other kind of rates or charges for service by said railroad company in the state of North Dakota, other than those filed with the Board of Railroad Commissioners of said state; that said rates and charges contained in said schedule are founded upon a misconstruction of the powers of the Postmaster General as delegated by said acts of Congress.

VIII.

Each and all of the said charges contained in said schedule are unreasonable and excessive and do not serve any useful purpose. On the contrary, they tend to lessen the use of the lines of railroad of said company, thereby lessening the revenue of said company to such an extent as to injure its financial condition, to the great detriment of said company and each and all of its stockholders
8 and by decreasing the amount of travel and the number of shipments and the ordinary flow of business in the state of North Dakota, in the territory contiguous to its lines of railroad, tends to hamper and decrease the general productive efficiency of the people of the state of North Dakota.

IX.

That said defendant railroad company did, on the 10th and 25th days of June, 1918, respectively, put into full force and effect and apply to intrastate business in the state of North Dakota, the schedule of rates and charges contained in said order of Wm. G. McAdoo, without first filing said schedule with the Board of Railroad Commissioners of the state of North Dakota, as provided by Section 4725 of the Revised Code of North Dakota for 1913; thereby permitting no complaint to be filed with said Board for hearing in which said Board could determine the reasonableness and nondiscriminatory nature of said freight rates and charges.

X.

That said orders of W. G. McAdoo, which defendant railroad company put into full force and effect and applied to the interstate busi-

ness of said company in the State of North Dakota, is the result of an unlawful abuse of power vested in said Wm. G. McAdoo by law, and enforcement of which is now, and has been during the entire period of their enforcement, an excessive and illegal burden upon the patrons of said railroad company and against the public welfare, convenience and business interests of the state of North Dakota and contrary to the laws of the said State of North Dakota.

Wherefore and in consideration of which, and inasmuch as plaintiff is remediless at or by the strict rules of common law and only relievable in a court of equity, where matters of this kind are properly cognizable, plaintiff files this, its complaint against said
9 defendant, and prays:

That said defendant railroad company, its officers, agents, attorneys and any and all others acting or to act under, for and through it or by its direction or in its behalf, may be properly enjoined and restrained from continuing in effect said schedules of rates and charges in its intrastate business in the State of North Dakota and from the collection of or any attempt to collect any of the fares, rates or charges for intrastate passenger, baggage and freight services contained in said Order of said Wm. G. McAdoo of May 25th, 1918; and that an alternative writ issue from this court against the defendants, directing them to show cause, and each of them, why such permanent injunction should not issue against the continuing in force of said schedules and the collecting of said rates, fares and charges:

That plaintiff may have such other and further relief in the premises as the nature of the case shall require and to your Honors shall seem meet.

STATE OF NORTH DAKOTA,
Plaintiff.

W. LANGER,
Attorney General and Relator.

FRANK E. PACKARD,
Counsel for Plaintiff.

10 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

William Langer, being first duly sworn, on his oath says that he is the duly elected, qualified and acting Attorney General in and for the State of North Dakota, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated upon information and belief, and as to them he verily believes the same to be true.

WM. LANGER.

Subscribed and sworn to before me this 14th day of February, 1919.

[SEAL.] ROY M. HALIDAY,
Notary Public, Burleigh County, North Dakota.

My commission expires Oct. 18, 1921.

11 In the Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES as Director General of Railroads of the United States, Respondents.

Affidavit.

STATE OF NORTH DAKOTA,
County of Barnes, ss:

C. S. Dupuis, being first duly sworn, deposes and says, that he is now and has been for some time last past, a duly elected, qualified and acting member of the Board of Railroad Commissioners of the State of North Dakota; that for many years last past said board of railroad commissioners, as provided by Article 21 of the Compiled Laws of 1913, and other provisions of law, has exercised supervision over rates and general regulatory powers over all of the railroad companies operating lines within the state of North Dakota; that Section 4725 of the Compiled Laws of North Dakota for 1913, provides that before any fares, charges or rates may be changed by any railroad company so operating that notice must be filed with said commission at least ten days before said schedule of fares, rates and charges becomes effective;

That by an act of Congress of August 29th, 1916, the President of the United States was empowered to assume possession of, and control over, and operate the railroad systems of the United
12 States as a war measure; that pursuant to such act of Congress, the President of the United States, on December 26th, 1917, by proclamation assumed possession of and control over said railroads; that on March 21, 1918, further powers were conferred upon the President of the United States by Congress, fixing the nature and limits of such control and operation; that in pursuance of said powers thus conferred, on the 25th day of April, 1918, the Director General of Railroads, Wm. G. McAdoo, issued general order No. 28, putting into effect upon June 10, 1918, certain freight rates, and on June 25th, 1918, a certain schedule of passenger fares and baggage charges; that said freight rates contained in said order were a marked increase over the rates then prevailing in the State of North Dakota, amounting to more than twenty-five percent; and that said passenger fares and baggage charges were greatly increased in said state; passenger fares from two and one-half cents to three cents a mile and the charges governing the transportation of baggage by a large percentage;

That said rates and charges were put into full force and effect on said date without a schedule of rates, fares and charges being filed with the Board of Railroad Commissioners of the State of North

Dakota; that at the time said schedule of fares, charges and rates was put into effect by order of said Director General of Railroads, that all of the railroad systems operating in said State had filed said schedules of fares, charges and rates, and that such schedules were in full force and effect on June 10th and June 25th, respectively, 1918, and have remained on file in said offices continuously since said date;

That said order of Wm. G. McAdoo of May 25th, 1918, which put into full force and effect in the State of North Dakota, the schedule of rates, charges and fares therein contained, was unauthorized by, and contrary to the acts of Congress of August 26th, 1916 and March 21, 1918, and the proclamation of the President of
13 the United States on December 26th, 1917; that none of said fares, charges or rates prescribed in said order affected the transportation of troops, war materials or supplies by the Government of the United States, nor did they affect the issue of stocks and bonds by defendant railroad company, and in no way affected the government of the United States in the prosecution of the present war;

That all of the said charges, fares and rates contained in said order are unreasonable and excessive, and do not serve any useful purpose. On the contrary they inflict a great hardship on the people of the state of North Dakota, in that they tend to lessen the use of the lines of railroad of said company, thereby lessening the revenue of said company to such an extent as to injure its financial condition, to the great detriment of said company and each and all of the stockholders; and by decreasing the amount of travel and the number of shipments and the ordinary flow of business in the state of North Dakota in the territory contiguous to its lines of railroads, tends to hamper and decrease the general productive efficiency of the people of the state of North Dakota; that the question raised by the petition herein involves the prerogatives and sovereignty of the state of North Dakota, and is a matter vitally affecting the interest of all the people of the state; and that there is no plain, speedy or adequate remedy at law available to protect the people of the state of North Dakota from such excessive fares, rates and charges or the stockholders of said corporation from the decreased revenues resulting to said corporation therefrom.

Wherefore, this affiant prays that this honorable court issue an alternative writ of mandamus or any other appropriate writ, under the seal of said court, directed to the said Northern Pacific Railroad Company, its officers, agents, attorneys, and any and all others acting or to act under, for or through it, or by its direction or in
14 its behalf, and the said Walter D. Hines, as Director General of Railroads of the United States, restraining them and each of them, forthwith from continuing in effect said schedule of fares, rates and charges in intrastate business in the state of North Dakota, and from the collection of, or any attempt to collect, any of the fares, rates or charges for interstate passenger, baggage or freight services, contained in said order of said Wm. G. McAdoo of May 25th, 1918; that said defendants be commanded to forthwith col-

lect only such fares, rates or charges, for interstate passenger, baggage and freight service as are contained in the schedule of rates and charges of said defendant now on file in the office of said Board of Railroad Commissioners of the State of North Dakota.

C. F. DUPUIS,
Railroad Commissioner.

Subscribed and sworn to before me this 14th day of February, 1915.

WM. LANGER,
Notary Public.

15 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES, as Director General of Railroads of the United States, Respondents.

Order.

On reading and filing the petition of William Langer, Attorney General of the State of North Dakota, and the affidavit of C. S. Dupuis, member of the Board of Railroad Commissioners of the State of North Dakota in support thereof, and on motion of said William Langer, let an alternative writ of mandamus issue out of and under the seal of this court, to the Northern Pacific Railroad Company and Walter D. Hines as Director General of Railroads of the United States, reciting that whereas it appears to this court by said verified petition and the affidavit in support thereof that the said William Langer is the duly elected, qualified and acting Attorney General in and for the State of North Dakota, and that the said C. S. Dupuis is a duly elected, qualified and acting member of the Board of Railroad Commissioners in and for the State of North Dakota, and that the said Northern Pacific Railroad Company is a railroad corporation engaged in carrying passengers, freight and baggage between points wholly within the State of North Dakota, and that the said Walter D. Hines is the duly appointed, qualified and acting Director General of Railroads for the United States, and that said Walter D. Hines and his predecessor in office, Wm. G.
16 McAdoo, put into force and effect, and that said Northern Pacific Railroad Company is collecting fares, rates and charges for the carrying of passengers, baggage and freight between points in the State of North Dakota, a schedule of said rates and charges which has not been filed with the Board of Railroad Commissioners of the State of North Dakota as required by law, and that a schedule of fares, rates and charges of said Northern Pacific Railroad Company are now and have been for more than a year last

past on file with the Board of Railroad Commissioners of the State of North Dakota, as required by law, commanding that said Northern Pacific Railroad Company and said Walter D. Hines desist from collecting any fares, rates, or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, except the fares, rates or charges for said services now on file in the office of the Board of Railroad Commissioners of the State of North Dakota, or that they or each of them show cause before this court at the Capitol at Bismarck, North Dakota on the 22nd day of February, 1919 at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard why they have not done so.

Dated this 14 day of February, 1919.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of North Dakota.

17 In the Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES, as Director General of Railroads of the United States, Respondents.

Alternative Writ of Mandamus.

Whereas, it appears to this court by said verified petition and the affidavit in support thereof, that the said William Langer is the duly elected, quaiified and acting Attorney General in and for the State of North Dakota, and that the said C. S. Dupuis is a duly elected, qualified and acting member of the Board of Railroad Commissioners in and for the State of North Dakota, and that the said Northern Pacific Railroad Company is a railroad corporation engaged in carrying passengers, freight and baggage between points wholly within the State of North Dakota, and that the said Walter D. Hines is the duly appointed, qualified and acting Director General of Railroads for the United States, and that said Walter D. Hines and his predecessor in office, Wm. G. McAdoo, put into force and effect, and that said Northern Pacific Railroad Company is collecting fares, rates and charges for the carrying of passengers, baggage and freight between points in the State of North Dakota, a schedule of said rates and charges which has not ben filed with the Board of Railroad Commissioners of the State of North Dakota as required by law, and that a schedule of fares, rates and charges of said Northern Pacific Railroad Com-

18 pany are now and have been for more than a year last past on file with the Board of Railroad Commissioners of the State of North Dakota, as required by law, let an alternative writ of mandamus issue out of and under the seal of this court commanding that said Northern Pacific Railroad Company and said Walter D. Hines desist from collecting any fares, rates, or charges for carrying passengers, freight, and baggage between points wholly within the State

of North Dakota, except for fares, rates or charges for said services now on file in the office of the Board of Railroad Commissioners of the State of North Dakota, or that they or each of them show cause before this court at the Capitol at Bismarck, North Dakota on the 22 day of February, 1919, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard why they have not done so.

Let due service thereof together with a copy of said affidavit and petition be made upon the persons to whom this writ is hereinbefore directed, without delay.

Witness the Hon. A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, my hand and official seal at Bismarck, North Dakota, this 14 day of February, 1919.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of the State of North Dakota.

Atest:
J. H. NEWTON, *Clerk.*

19 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Feb. 14, 1919. (Original.) Filed for service in this office the 15th day of Feb. 1919. Served this — day of ——. Returned this — day of ——. Rollin Welch, Sheriff of Burleigh County, N. D., by R. G. Phelps, Deputy. No. —.

20 Filed in the Offie of the Clerk of the Supreme Court, State of North Dakota, Feb. 25, 1919.

In the Supreme Court of the State of North Dakota.

3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer and Return to Alternative Writ of Mandamus.

Charles Donnelly, Attorney for W. D. Hines, St. Paul, Minnesota.

21 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer and Return to Alternative Writ of Mandamus.

Comes now Walker D. Hines, as Director General of Railroads, one of the above named defendants, and makes this his separate answer and his separate return to the alternative writ of mandamus herein, and says:

1. He admits that the relator is the Attorney General of North Dakota, as alleged, and that the Northern Pacific Railway
22 Company (erroneously named in the complaint as the Northern Pacific Railroad Company) is a corporation organized under the laws of Wisconsin, and that it has owned and still owns a system of railway lines extending from Ashland, Wisconsin and Saint Paul and Minneapolis, Minnesota, westerly through the states named in paragraph II of the complaint, and into or through the counties of North Dakota named in said paragraph, and admits that the railroad of said Company has been and now is an instrumentality both of state and interstate commerce; but he denies that said company has operated its system of transportation since December 28, 1917.

2. He admits that he is now and since January 11, 1919, has been, and that from December 28, 1917 until January 11, 1919, his predecessor in office, William G. McAdoo, was the duly appointed, qualified and acting Director General of Railroads, in possession and control of the lines of the defendant Railway Company and of nearly all of the railroad mileage of the United States; but he denies that he exercises or that his predecessor in office exercised possession and control over the lines of the defendant Railway Company through said Company.

3. He admits the averments of paragraphs IV and V of the complaint, except that he denies that the Board of Railroad Commissioners referred to therein has exercised or could lawfully exercise supervision or control over the rates, fares or charges initiated by the Director General of Railroads as hereinafter stated.

23 4. He admits that the Director General of Railroads on May 25, 1918, made his General Order No. 28, and for the determination of the scope and meaning thereof he craves leave to refer to the terms of said order.

5. He admits that in making said General Order No. 28 the Director General of Railroads acted under and by virtue of the laws of Congress and of the proclamations of the President made pursuant

thereto; but otherwise he denies the averments of paragraph VII of the complaint.

6. He denies the averments of paragraph VIII of the complaint.

7. He admits the averments of paragraph IX of the complaint, except that he avers that said rates and charges were put into effect by the Director General and not by the Railway Company.

8. He denies the averments of paragraph X of the complaint.

Further answering, this defendant alleges:

9. That by an Act of Congress approved August 29, 1916, it is provided:

"The President in time of war is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

24 10. On April 6, 1917, by joint resolution of the Senate and House of Representatives of the United States, it was duly resolved that a state of war existed between the United States and the Imperial German Government.

11. On the 26th day of December, 1917, the President by proclamation, by virtue of the power so vested in him, and by all other powers thereto enabling him, did, through the Secretary of War, take possession and assume control on December 28, 1917, of each and every system of transportation and appurtenances thereof within the boundaries of the United States, including the system of transportation of the defendant Railway Company, and consisting of railroads, etc., and all other equipment and appurtenances commonly used upon or operated as a part of such railroad or transportation systems, and did appoint William G. McAdoo as Director General of Railroads, and authorize and charge him with the operation of said transportation system.

12. Thereafter Congress, by an act entitled, "An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the just Compensation of their Owners, and for other Purposes," approved March 21, 1918, did extend the authority of the President in the premises.

13. On March 29, 1918, the President made his further proclamation, of which the following is a copy:

25 "A Proclamation

Authorizing the Director General of Railroads to Exercise Powers Conferred on the President by Congress.

Whereas, by the proclamation dated December 26, 1917, taking over each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, it was provided 'that the possession, control, operation, and utilization of such transportation systems hereby by

me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads,' and the said William G. McAdoo pursuant to said proclamation entered upon and has continued to discharge the duties of Director General of Railroads as provided therein; and

Whereas, since the issuance of said proclamation the Congress of the United States has passed an act entitled An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of their Owners, and for other Purposes, which act was duly approved by me on the 21st day of March, 1918, and is now in full force and effect; and in terms confers upon the President the powers specified therein and the authority to carry the same into effect; and

Whereas, it is provided in Section 8 of said act that the President may execute any of the powers therein and theretofore granted him with relation to the Federal control of systems of transportation and parts thereof, including railroads, inland waterways, etc., through such agencies as he may determine;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in
26 me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President to agree with the carriers or any of them or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 29th day of March in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

WOODROW WILSON.

By the President:

[SEAL.] ROBERT LANSING,

Secretary of State."

14. On May 25, 1918, Wiliam G. McAdoo, as Director General of Railroads, made his Order No. 28, reading as follows:

"General Order No. 28.

Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.'

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines, under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by rail-
28 road and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibit' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this 25th day of May, 1918.

W. G. McADOO,
Director General of Railroads."

15. Pursuant to said order the Director General of Railroads, acting through the officers and agents of the defendant Company, filed with the Interstate Commerce Commission tariffs publishing and making effective for the carriage of freight, passengers and baggage between points in North Dakota, as well as between other points along its line, the increased rates, fares and charges provided for in said order and in the exhibit thereto attached, which said increased rates, fares and charges had been initiated by the Director General

of Railroads and are still in effect and are the rates, fares and charges complained of in the complaint herein and large sums of money, to-wit, many millions of dollars, have been collected under such increased intrastate rates and fares in North Dakota, and the other states of the United States, and have been disbursed.

16. On August 1, 1918, said William G. McAdoo as Director General of Railroads, acting by and through R. H. Aishton,
29 Regional Director of the Northwestern Region, appointed J. M. Hannaford Federal Manager of the lines of said Northern Pacific Railway Company and relieved the officers and agents of said Company, and all others acting through or under it from all connection therewith, and deprived them of all control over the operation thereof, and since that date the operation of said system of transportation has been and is now conducted, and the collection of all rates, fares and charges for service performed in connection therewith, has been and is now made by and in the name of the Director General of Railroads.

Wherefore, this defendant prays that the complaint herein be dismissed, that the alternative writ of mandamus heretofore issued herein be quashed, and that this defendant have such other and further relief as to the Court may seem proper, together with his costs herein.

WALKER D. HINES,
Director General of Railroads,
By CHARLES DONNELLY,
His Attorney.

MELVIN A. HILDRETH,
United States District Attorney
for North Dakota, of Counsel.
JOHN CARMODY,
Asst. U. S. Atty.

29½ STATE OF MINNESOTA,
County of Ramsey, ss:

Charles Donnelly, being duly sworn, deposes and says that he is one of the attorneys for the defendant Walker D. Hines, as Director General of Railroads; that he has read the foregoing answer and return and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

CHARLES DONNELLY.

Subscribed and sworn to before me this 21st day of February, 1919.

[NOTARIAL SEAL.] F. J. GEHAN,
Notary Public, Ramsey County, Minn.

My commission expires Apr. 4, 1925.

30 Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Feb. 25, 1919.

In the Supreme Court of the State of North Dakota.

3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Separate Answer of Northern Pacific Railway Company.

31 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer of Northern Pacific Railway Company.

The defendant Northern Pacific Railway Company misnamed in the complaint "Northern Pacific Railroad Company," for its separate answer to the complaint admits all the allegations of the complaint except as hereinafter qualified or denied.

Defendant says that William G. McAdoo from on or about the 28th day of December, 1917, until on or about the first day of
32 August, 1918, exercised possession and control of the transportation system belonging to this defendant and referred to in the complaint through the officers and agents of this defendant in its employ when said federal control commenced. That on the first day of August, 1918, the said William G. McAdoo commenced to exercise such possession and control through his own officers and agents and since that day he and his successor Walker D. Hines have at all times and do now exercise such possession and control through various agents by them duly appointed. Since the 28th day of December, 1917, this defendant had no possession or control of its transportation system or any part thereof, which at all times has been in the possession and control of the President of the United States. While until the first day of August, 1918, the said Director General exercised such possession and control through the officers, directors and agents of this defendant, all such officers, directors and agents were with respect to said system of transportation absolutely under

the direction of the United States Government and not of this defendant.

Defendant denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint setting forth acts or doings of the Director General of the United States Railroad Administration; except defendant admits that the said William G. McAdoo in putting into force and effect certain advanced passenger fares on June 10, 1918, and certain advanced freight rates on
33 June 15, 1918, used the names of certain former officers of this defendant. But this defendant denies that it put into force or effect or applied the advanced tariffs complained of or either or any of them. Each and every of the said tariffs were in fact initiated by the President of the United States through the Director General, United States Railroad Administration, and were filed and published under the sole authority of the said Director General and in the manner ordered by him.

This defendant denies that each or any of the charges referred to in paragraph VIII of the complaint are unreasonable or excessive. Alleges that instead of tending to lessen revenue derived from said lines of railroad they increase the same. This defendant however says that the said charges have no effect upon the defendant company or its stockholders inasmuch as revenues therefrom are exclusively the moneys of the United States.

Defendant denies that it has any power or authority over the tariffs complained of in the complaint or any of them.

Wherefore it prays to be hence dismissed.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN,
Vice President and General Counsel.

WATSON, YOUNG & CONMY,
Attorneys.

33½ STATE OF MINNESOTA,
County of Ramsey, ss:

Charles W. Bunn being duly sworn on his oath says that he is Vice President and General Counsel of the Northern Pacific Railway Company, the defendant in this suit making the foregoing answer; that the said answer is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he verily believes it to be true.

CHARLES W. BUNN.

Subscribed and sworn to before me this 21st day of February, 1919.
[NOTARIAL SEAL.] EDWIN IRLE,
Notary Public, Hennepin County, Minn.

My commission expires November 29, 1922.

34 Bismarck, N. D., April 1, 1919.

Pursuant to adjournment court convened at 10 a. m., all the judges and clerk of court being present:

Now the Court directed the entry of the following order:

File No. 3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Ordered, That a peremptory writ do issue in accordance with the views expressed in the opinion this day filed.

* * * * * * *

35 In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Under the authority vested in him by Act of Congress of August 29, 1916, the President of the United States, on December 26, 1917, issued a proclamation assuming the possession and control of the railroad systems of the United States. On March 21, 1918, an Act of Congress was approved, which provided for the operation of the transportation systems then under government control and for just compensation to their owners. Acting under Section 10 of that Act, the Director General of Railroads promulgated General Order Number Twenty-Eight, increasing freight rates horizontally and prescribing a uniform passenger fare of 3¢ per mile, not distinguishing between interstate and intrastate traffic. Held:

(1) The Act of Congress of March 21, 1918, confers upon the President extraordinary executive powers rendered necessary by the existence of a state of war.

(2) The termination of hostilities under the armistice does not justify judicial interference to restrain the further exercise of the extraordinary executive powers rendered necessary by the existence of a state of war.

(3) Section 10 of the Act of Congress of March 21, 1918, which gives to the President power to initiate rates, fares, charges, classifications, regulations and practices, is construed in the

light of the other provisions of the act and of the pre-existing method of regulating commerce through the agencies of Federal and State governments, and as so construed it does not confer original authority to initiate intrastate rates which will supersede pre-existing lawful rates prescribed by the legislature or other competent state authority.

(4) Rates initiated by the President or Director General,
36 under Section 10, are subject to review by the Interstate Commerce Commission, and its power to revise or alter is the power previously vested in it under the Act to Regulate Interstate Commerce, as amended, which gives it no authority to regulate intrastate rates as such.

(5) Under the Interstate Commerce Act, as amended, the Interstate Commerce Commission has authority to modify intrastate rates otherwise valid only when the modification of such rates is necessary to the complete exercise of its jurisdiction over interstate commerce.

(6) In the absence of a clear expression of intention to repeal existing state regulations affecting intrastate commerce, it will not be presumed that Congress so intended.

(7) Under Section 15 of the Act of March 21, 1918, which provides that nothing in the Act shall be construed to repeal, impair, or affect the existing lawful police regulations of the states except where such regulations may affect the transportation of troops, war materials, and government supplies, or the issue of stocks and bonds, pre-existing intrastate rates continue in effect as lawful police regulations.

(8) The term "police regulations," as used in Section 15, is not limited to regulations directly affecting the health, lives and morals of the people, but embraces regulations designed to prevent discrimination and economic oppression.

(Syllabus by the Court.)

Original Proceeding in Mandamus on Relation of the Attorney General.

Peremptory Writ Awarded.

Opinion of the Court by Birdzell, J.

Charles Donnelly, Minneapolis, Minn., Attorney for Director General; M. A. Hildreth, U. S. District Attorney for N. Dak., and John Carmody, Asst. U. S. Atty., of Counsel, attorneys for defendants.

Wm. Langer, Attorney General, attorney for Petitioner; Frank E. Packard, Counsel for Petitioner.

37 STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER

vs.

NORTHERN PACIFIC RY. CO. and WALKER D. HINES, Director General of Railroads.

BIRDZELL, *J.*:

On the application of the above named plaintiff an alternative writ of mandamus issued out of this court, commanding the defendants to desist from collecting any fares, rates or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, other than those stated in the schedules on file in the office of the Board of Railroad Commissioners of the State; or that they show cause why they have not done so. The foregoing writ issued in accordance with the prayer of a complaint and petition alleging, among other things not material to be noticed, that, by virtue of an Act of Congress of August 29th, 1916, the President of the United States issued a proclamation on December 26th, 1917, following which he assumed possession and control of the railroad systems of the United States, and that he has been in such possession since January 1, 1918; that on May 25th, 1918, William G. McAdoo, predecessor in office of the defendant Walker D. Hines, as Director General of Railroads of the United States, issued General Order No. 28, whereby he directed the railroads, under his control to put into force and effect on June 10, 1918, certain passenger fares and baggage charges, and on June 25, 1918, certain freight rates, which fares, charges and rates were in excess of those previously authorized to be collected on the intrastate commerce of the defendant company within the State of North Dakota.

Separate answers were filed by the railroad company and by the said Hines, as Director General. The answer of the railroad company alleges that from December 28th, 1917, until on or about August 1, 1918, the Director General exercised possession and control of its transportation system through the officers and agents of the defendant company; but that since August 1, 1918, such possession and control have been exercised through various agents appointed by the Director General. Denying that the defendant company has any power or authority over the tariffs complained of, it asks
38 that the action be dismissed as to it.

The answer of the Director General sets forth the legal basis relied upon to support General Order No. 28, and asks that the alternative writ be quashed.

Counsel for the Director General, at the outset of the argument, expressly state that no question relating to the jurisdiction of the court is raised; that jurisdiction is conceded, and that the question before the court is one of the power of the Director General under the Rail Control act. Consequently it is unnecessary for us to consider what the authority of the Director General may be outside the Act.

There is, then, but a single question involved in this proceeding, and that is the validity of General Order No. 28 as applied to rates, fares and charges for intrastate commerce. The effect of the order, if valid, is admitted. It fulfils the intention therein expressed to increase freight rates upon all business, both interstate and intrastate, 25%, and to establish passenger fares on the basis of 3¢ per mile for both interstate and intrastate carriage (except that where the intrastate rate of fare may exceed 3¢ per mi. it is not reduced), and changes are also effected in charges for excess baggage which purport to be applicable to both interstate and intrastate commerce.

The validity of the order depends upon the construction of Section 10 of the Act of March 21, 1918, which is entitled "An Act to Provide for the Operation of Transportation Systems While Under Federal Control, for the Just Compensation of Their Owners and for Other Purposes." The section which is relied upon as containing the authority to promulgate the order in question is as follows:

"Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto, shall, upon motion of either party be transferred to the court in which it was originally
39 instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or

practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act. Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway-operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

Before entering upon the discussion of the meaning of the above section, we should note the fact that possession and control of the railroads had been assumed by the President, acting under the authority of an Act of Congress of August 29th, 1916, which provided that the president in time of war was "empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." The act, of which Section 10 first above quoted is a portion, was adopted after Federal control was an established fact. It should be stated, too, that the finding and certificate referred to in the proviso of Section 10 above were made and filed with the Interstate Commerce Commission.

The contention of the plaintiff is that the authority to "initiate rates, fares, charges, etc.," is only applicable to interstate commerce and, in support of this contention, arguments are advanced which are drawn from the history of the Federal regulation of commerce, as well as from other sections of the act in question, considered in connection with the act to regulate interstate and foreign commerce, as amended. It is also argued that the order is void on the ground that it is not apparent that the act giving such plenary power to the President was adopted for the purpose of enabling him to exercise the broad executive functions rendered necessary by the existence of a state of war. And further, that, if such powers are justified only as war powers, the justification ceased upon the signing of the armistice. It is recalled that immediately following this event the President announced to Congress, "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." We feel that the latter contention may be briefly disposed of by referring to Section 10 of the act. It provides for the initiation of rates by the

President "whenever, in his opinion, the public interest requires." The vesting of such a power in the executive is so patently obnoxious to the competent method of rate regulation under normal conditions, that it is not to be assumed Congress would have vested the power in such terms except as a means of facilitating the extraordinary executive functions which are conferred upon the President in times of war. The power to regulate rates is legislative, and rates are initiated either by the carriers themselves, by legislation, or by a tribunal or agency, upon which the legislature has imposed the duty.

It was not until the act of June 18, 1910, that the power to prescribe a rate applicable to interstate commerce was vested in the Interstate Commerce Commission. Prior thereto, under Section 15 of the Hepburn Act of June 29th, 1906, the Interstate Commerce Commission had power to declare given rates unjust or unreasonable, but it was held by the United States Supreme Court, in Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Ry. Co., 167 U. S. 479, that the power to declare certain rates charged by the carrier to be unreasonable and unjust did not include the power to prescribe or fix rates, and, as this power was legislative in character, it could not be held to be vested in the Interstate Commerce Commission by implication. Later, however, when the Act of 1910 vested in the Commission power to prescribe and fix
41 rates, the court held, in Interstate Commerce Commission vs. Louisville & Nashville Ry. Co., 227 U. S. 88, that the statute which, in reality, delegated the legislative function to the Interstate Commerce Commission, was valid; but it was held to be valid because it provided for due process of law in such matters. The court said:

"* * * But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding, without evidence is arbitrary and baseless, and if the Government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal, under our government. It would mean that, where rates depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The above language is, of course, as applicable to any attempt to confer upon the President a power to prescribe, without a hearing, rates which cannot be suspended pending a final determination by another tribunal as to any attempt to vest a similar power in a commission. The fact that Congress originally authorized the possession and control to be taken in the event of war, coupled with the fact that it expressly made applicable a rate making procedure which would be clearly unconstitutional in times of peace, is satisfactory

evidence that the possession and control of the railroads by the President is purely a war measure. As a war measure, the government necessarily assumes its constitutional obligation to make compensation. (See U. S. vs. Russell, 13 Wallace, 623, 20 L. Ed. 474). And the burden of administration was placed where it would be free from possibility of conflict with the constitutional authority to command the armies and navy, hence it devolved primarily upon the chief executive.

The foregoing observations would not be strictly applicable to the fixing of rates for a service that is supplied by the Government itself through its own agency or instrumentality. But we do not find in the act in question any evidence that Congress intended to treat the transportation systems as belonging to the Government. It rather appears that they are to be utilized primarily for war purposes, while at the same time their ordinary uses are to continue as far as possible.

It is provided, for instance, that suits may be maintained
42 against the carriers; that the rates, fares and charges are to be measured by an existing standard of reasonableness, which is to be finally determined and applied by an authority other than the President, and that the property is to remain subject to the taxing power of the states. These and other provisions sufficiently indicate the intention to continue the pre-existing legal relationship between the carriers on the one hand and the public on the other that we ought not to presume, in the absence of some definite expression, a purpose to discontinue the ordinary standards and means for determining the rights of patrons. Except to the extent that these standards and means are subordinated to the needs of the government in handling the problem before it, they still exist.

Neither can we construe the military exigency which gave rise to the necessity for the government taking possession of the transportation facilities to have terminated. The act itself fixes the period of control as one which shall continue during the war "and for a reasonable time thereafter, which shall not exceed one year and nine months first following the date of the proclamation by the President of the exchange of the ratifications of the treaty of peace." So, even though hostilities may have ceased, it is apparent that the time has not arrived for the mandatory termination of government control under the Act of Congress, or for the enforced rescission of orders thereunder, originally justified as meeting war emergencies. A reading of the legislation upon the subject of transportation in its relation to the national defense, discloses that there are many interests affected, both of the government, of the carriers and of the public, which are sought to be safeguarded through the employment of appropriate means to that end by the executive department. The variety and extent of these interests suggest numerous intricate problems to be solved by the legislative and executive departments. For these reasons it is apparent to us that the termination of Federal control can not be judicially fixed at any other time than that prescribed by Congress.

The case then resolves to a mere question of statutory construction, and in arriving at the meaning of the act the various provisions must

be read so that all may be given effect without inconsistency
43 (New Lamp Chimney Co. vs. Ansonia Brass Co., 91 U. S. 656-661) and particular words must not be selected or given an effect that will "virtually destroy the meaning of the entire context" or "give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive as of its obvious intent." Van Dyke vs. Cordova Copper Co., 234 U. S. 188-191. It is important that every provision of the act shall be regarded and that it shall be so construed as to give effect to its spirit and paramount purpose. In so construing the law, it is proper not only to consider the language found within its four corners, but to look as well to the history of the subject matter involved in an effort to harmonize, if possible, any provisions that are apparently conflicting.

It is true, as asserted by counsel for the petitioner, that Congress, prior to the enactment of the legislation in question, had never undertaken to regulate commerce carried on within a state. Section 1 of the Interstate Commerce Act expressly provides that it "shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid." Since this act, as amended from time to time, gives to the Interstate Commerce Commission all the regulatory authority it possesses, (unless the Federal Control Act enlarges it), it is clear that it has not been authorized to regulate, directly and primarily, intrastate commerce. It will readily be conceded that Congress possesses ample power to regulate intrastate commerce to the extent necessary to make effective its power to regulate interstate commerce: (Houston & Texas Railway Co. v. United States, (Shreveport Case) 234 U. S. 342; American Express Co. vs. South Dakota, 244 U. S. 617); but it is important to keep in mind the limitation. In the absence of clearly expressed legislative intention it will not be presumed that the power to regulate interstate commerce has been so vested in Federal authorities as to nullify every state regulation that only indirectly or remotely affects interstate business. (Reagan vs. Mercantile Trust Co., 154 U. S.
44 413; Simpson, et al., vs. Sheppard, et al., 230 U. S. 352.)

Neither are we inclined to question the power of Congress, in providing for Federal control of transportation during a war emergency, to vest in the President the full administrative power necessary to effectuate such a degree of unified control as would be independent in every respect of existing state regulations or of all state regulating authority. We are only concerned here with ascertaining whether or not Congress has vested powers in the President which may properly be exercised independently of all state regulations affecting intrastate rates. It would seem that, if it were intended to invest the President with the broadest range of authority, language would have been employed which would be wholly adequate to manifest that intent. As was said by Mr. Justice Brewer, in the case of Reagan vs. Mercantile Trust Co., supra, page 416, in interpreting an act under which a railroad corporation was organzed, "* * * there is nothing in the act creating this company which indicates an intent on the part of Congress to so remove it

(i. e., from state regulation), and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation, Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points and also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, insofar as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislation of the state, passed in 1873 in respect to it, we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

Another expression opposed to the implying of restrictions on the power of the states to regulate intrastate commerce is that of Mr. Justice Hughes, in the Minnesota Rate Cases, Simpson, et al. v. Sheppard, et al., supra, page 417:

45 "If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province."

The argument that the intrastate commerce rates prescribed by the Minnesota statutes were invalid because operating prejudicially upon interstate rates was met by the following considerations, page 420:

"Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to estab-

lish a unified control over interstate and intrastate rates; it did not set up a standard for interstate rates or prescribe, or authorize the commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had ben found; that is, with the states and the agencies created by the states to deal with that subject."

The terse statement of Mr. Justice Harlan, in delivering the opinion of the court in the case of Reid v. Colorado, 187 U. S. 137-148, supports the rule of construction for acts of Congress which we deem to be proper when the subject matter vitally affects the principal power of a state, and one which must give way to the paramount power of the Federal government only when Congress deems it wise to intervene. The statement is:

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

Since the only portion of the act in question which may be said to vest in the President the authority contended for is that portion of Section 10 giving him power to initiate rates, fares charges, etc., it remains to be seen whether, when read in connection with its context and with other sections of the act in the light of the pre-existing scheme, according to which commerce was regulated by the Federal and State governments, Congress has clearly manifested its de-
46 sire to authorize what has been done. Standing alone, the expression of authority to initiate rates would clearly be broad enough to cover both interstate and intrastate commerce. We are of the opinion, too, that this broad language was entirely appropriate. The power to "initiate" a rate is one that has always been exercised by the carriers, and with the assumption of Federal Control it was essential that the full power be placed in a Federal agency. This is a sufficient reason for vesting the power in unrestricted terms. But the crucial question — whether or not limitations upon its future exercise are not prescribed in the Act.

The same section provides for an appeal to the Interstate Commerce Commission and authorizes that body to set aside or modify any rate, fare, charge, etc., that may be found to be unjust or unreasonable. In making its findings, the authority of this body must be sought in the act to regulate commerce as amended, since it is expressly remitted to that act for authority to make its findings and enforce its orders. It is clearly the intent of Section 10, construed as a whole, to give to the Interstate Commerce Commission an authority to review that is co-extensive with the authority of the President to initiate. It is doubtless also intended to require that all rates, fares, charges, etc., initiated under the act, shall be just and reasonable in the light of the circumstances, taking into consideration the necessity for increased operating revenues. It follows from this that, if increased powers,

extending to existing lawful intrastate rates, are given to the Interstate Commerce Commission, they are given in the Federal Control Act, and it is not at all clear that such was intended. To give to the control act the construction necessary to support the contention made is equivalent to amending by implication the Interstate Commerce Act so as to extend its scope to matters which were never before embraced within it. Indeed, it is tantamount to repealing the express provision that it shall not operate as to transportation wholly within a state. This might well have been the intention as to matters not previously covered by state regulations; but it is another matter entirely to ascribe such an intention as to a field of regulation already occupied.

47 That it was not intended to entirely supplant pre-existing regulations of the states seems to us to be even more clearly demonstrated by Section 15. The section is as follows:

"Section 15. Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks and bonds."

The foregoing section lays down a rule of construction for the entire act according to which it shall not be held to amend, repeal, impair or affect existing lawful police regulations of the several states, except wherein such regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds. The query arising from this section is, does the expression "lawful police regulations" include existing regulations with respect to intrastate rates, fares and charges? It is contended on behalf the Director General that such regulations are not included because, it is stated, the regulation of rates is not an exercise of the police power of the state. In support of this contention, it is argued that the police power, in the exercise of which lawful police regulations are made, is one which exists for the general welfare of society and is, therefore, one which cannot be bargained away. Attention is called to the fact that the regulation of rates is frequently accomplished, to a degree at least, by the exercise of the power to contract. We fail to perceive the force of the argument that would remove rate regulations from the category of the lawful police regulations of the state on account of the practical necessity which has rendered necessary the recognition of contract obligations originating in franchises. Never, since Lord Hale gave expression, in his De Portibus Maris, to the principle according to which pu-lic callings are subject to regulation, has there been any doubt of the right or the power of the state to regulate charges. In fact, it was the exaction of "arbitrary and excessive duties for cranage, wharfage, etc.," that led to the exercise of the power of control which was vindicated in the statement referred to. (See 2 Hargrave Law Tracts, 78). That this power is a part of the state's police power is hardly open to question, since

48 the decision in Munn vs. Illinois, 94 U. S. 113. In that case, Chief Justice Waite, delivering the opinion of the court,

quoted the definition of the police powers as framed by Chief Justice Tawney in the License Cases, 51 Howard, 583, in which he referred to them as "nothing more or less than the powers of government inherent in every sovereignty * * *; that is to say * * * the power to govern men and things." They were said to be powers which sprung from adherence to the maxim "sic uteri tuo ut alienum non laedas." It is the purpose of all rate regulation to preserve the common right to the service rendered in a public calling at a reasonable cost. Fundamentally, this is as much a matter of police regulation as are regulations designed to protect health and safety or to prevent discrimination. It matters little whether, in considering specific arrangements looking toward the security of the rights of the public in relation to common carriers, it may become necessary to recognize contractual arrangements made by a legislative body as a practical expedient; the power to regulate the rate is in its essence police, and the exercise of the power results in a "police regulation."

In the case of Reagan vs. Mercantile Trust Co., supra, it will be noted that the United States Supreme Court expressly characterized state regulations of rates as "police regulations" in the following expression:

"* * * we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

But, it is contended that the term "police regulations" appearing in the statute is one which may be used either in a limited sense or in a very comprehensive sense and that in the statute in question it is used in its "ordinarily accepted sense" as referring to the exercise of the power to protect the health, lives and morals of the people (Manigault v. Springs, 199 U. S. 473-481), rather than in the broader acceptation which, in reality, embraces everything essential to "the great public needs." (Noble State Bank vs. Haskell, 219 U. S. 104-111; Barbier vs. Connolly, 113 U. S. 27). In substance, the contention is that the particular sense in which the term is used
49 in a given place must be gathered from the context. We find nothing in the act, however, which, in our opinion, makes it necessary in executing its various provisions to distinguish between those police regulations that affect the health, lives and morals of the people and those that protect their convenience and economic welfare.

The argument that the reservation of "lawful police regulations" rather than the police power shows a purpose to limit the scope of the meaning is well met by a comparison with the reservation of the taxing power in the same section. The section preserves in full, not only the existing laws of the states relative to taxation, but it preserves as well, unimpaired, the power to tax. (See Congressional Record, Vol. 56, part 4, page 3313.) So the states may pass such future legislation upon the subject of taxation as would be constitutional if the roads were in private hands; provided, of course, it does not interfere with the transportation of troops, war materials, and government supplies. The roads are not declared to be in public ownership, and the power to tax is as broad as the similar power over

roads incorporated by act of Congress. (Union Pac. R. R. Co. v. Peniston, 18 Wall. 5; See also Congressional Record, supra), or as conceded by act of Congress in the case of National Banks. On the other hand, with regard to the police power generally, it is not to be exerted anew, or in a different measure or manner during Federal control from that existing before. The act only continues in force the existing police regulations, and the railroad administration is not bound to respect any additional police regulations. Centralization of administrative authority free from future interruptions was accomplished, but Congress accepted the status quo ante, so far as police regulations were concerned; and it authorized them to be ignored only when necessary to secure military efficiency in the matter of the transportation of troops, war materials, and government supplies.

The suggestion that a rate prescribed by statute, from which a carrier is prohibited from departing under penalty, is not a police regulation concerning the carriage of intrastate commerce, seems to us also as hereinabove indicated, to ignore the fundamental considerations that determine the validity of such regulations. In
50 Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, it was said:

"There can be no doubt of the power and duty (of the courts) to inquire whether a body of rates imposed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and if found to be so, to restrain its operation."

To a similar effect are Covington, etc., Turnpike Road vs. Sanford, 164 U. S. 578, and Lake Shore & Mich. S. Ry. Co. vs. Smith, 173 U. S. 684; German Alliance Insurance Co. v. Lewis, 233 U. S. 389. Rates are regulated because the business is affected with a public interest. Every regulation must be measured by the yard stick of reasonableness and must fall short of prohibition, destruction or confiscation in order to be valid. (Freund on Police Power, Section 63.) Nothing, it seems to us, falls more properly within the domain of police regulations than rules prescribed as a means of preventing economic oppression and securing equality of right to the service in a public calling. (See Freund on Police Powers, Section 378.)

A strong indication that the term "police regulations" was used in a much broader sense than that contended for is the fact that, in making exceptions to the regulations that should continue in force, Congress saw fit to expressly except regulations affecting the issuance of stocks and bonds. It will be noted that Section 7 gives to the President, in unambiguous terms, the right to control the issuance of securities during the period of Federal operation. Yet it was thought necessary in Section 15 to expressly except from the police regulations of the states which were to continue in force those affecting the issuance of stocks and bonds. Clearly these regulations are of a character that would not directly affect the public health, safety or morals. They are as much designed to protect the economic welfare of society as are those relating to rates, and there would have been no occasion to make the exception had the term "police regulations" been used in the sense contended for. (A statute of this character was involved in

a recent case, Union Pacific Railway Co. vs. Public Service Commission, U. S. Supreme Court, October Term, 1918, No. 65.)

The congressional history of the act in question, appended hereto, in our judgment, amply supports this construction. When
51 the bill originally passed the Senate it provided only for the continuation of the states' powers to tax. It was amended, however, in the House, by the addition of the following clause:

"Or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, *the regulation of rates, the expenditure of revenues, the addition or improvement of properties* or the issue of stocks and bonds." (Congressional Record, Vol. 56, Part 3, page 2820.)

The foregoing clause, after being tacked on to the provision "that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation," as previously contained in the bill, was transferred to the end and became a new section,—now Section 15. The conference committee later, reporting to the House and Senate, struck from the exceptions to the proviso above those exceptions which are italicized. This is a matter of some significance in determining the sense in which the term "police regulations" is used. If the exception of "the regulation of rates" previously inserted, had been allowed to stand, it is clear that every existing state regulation affecting rates would have been rendered nugatory upon the promulgation of an order by the Director General superseding such rates, whether or not the transportation of troops, war materials, or government supplies was affected, and the power would have existed just as it is contended for in this case. The striking of that clause, however, from the exceptions, indicates and intention to preserve existing state regulations affecting rates, except in so far as the transportation of troops, war materials and government supplies may be affected. To this must also be added, we believe, the power to prevent existing intrastate rates from operating in such a way as to result in unlawful discriminations on account of such regulations as it may be found necessary to promulgate in operating the roads as a unit.

As hereinbefore stated, the Federal government is supreme in the domain of interstate commerce and there is nothing in this act to indicate that the regulatory power, as it previously existed, was intended to be modified in the slightest degree by existing state
52 regulations. All the powers possessed by the Interstate Commerce Commission are to continue except the power to suspend rates.

In the case of Houston & Texas Ry. Co. v. United States, supra, the Supreme Court of the United States held that under Section 3 of the original Act to Regulate Commerce, February 4, 1887, (see 104, 24 Stat. 379-380) Congress having prescribed disciminatory rates and practices, the commission had authority to correct unjust discriminations even though, in so doing, it became necessary to alter pre-existing rates on intrastate commerce. Thus, under the power previously possessed by the commission, under the Act to Regulate Com-

merce, it would have full power to alter any intrastate rate that might result in an unlawful discrimination by reason of the initiation of a new interstate rate by executive authority, or that may result from a valid routing order. To the same effect is the recent case of American Express Co. v. South Dakota, supra.

The order in the instant case, as it relates to intrastate commerce, does not purport to have been promulgated for the purpose of obviating discriminations. On the contrary, a portion of the order, at least,—that which relates to intrastate passenger fares—cannot possibly be justified on any such basis as a simple illustration will suffice to demonstrate. Prima facia, it creates discriminations by disturbing the balance of preexisting fares that were just and reasonable. Prior to the order in question intrastate tickets were sold to and from all points within Minnesota at 2c. per mile; from and to all points within North Dakota at 2½c. per mile; and from and to all points in Montana at 3c. per mile, and the interstate fares were based upon the local rates. These intrastate fares were all presumptively legal and had been in operation for some time. Such differences as existed were readily accounted for by differences in cost of constructing roads in the various states, density of traffic, etc. Yet the necessity demanding increased revenues from the purely intrastate business was not recognized in the order as being general. The burden is not distributed by percentage increases that will affect all localities alike, but the patrons in one state are required to pay 50% above the previous lawful and reasonable fare, in another 20% above, and in the other no additional charge is imposed. This is a sufficient demonstration that
53 a portion of the order at least is not to be justified as a means of preventing discrimination: so it would not fall within any regulatory power previously exercised by the Federal government or possessed by the Interstate Commerce Commission.

In considering the character of Order No. 28 in its direct effects upon intrastate commerce, it is also proper to note that all rates initiated are to be measured upon review by the Interstate Commerce Commission according to the "expenses of Federal control and operation fairly chargeable to railway operating expenses," and to pay certain fixed charges. This is not a blanket authority to increase rates, but a limitation. Its true character is perhaps best understood by referring to the very substantial appropriation of $500,000,000 to be used as a revolving fund, and to the then recent fact of the denial by the Interstate Commerce Commission of an application for a general increase of 15% in interstate freight rates. Ex Parte, (The Fifteen Percent. Case) 45 I. C. C. Reports, 303. These facts, together with the further well known fact that by far the larger percentage of earnings is from interstate commerce, do not indicate that a percentage raise on all traffic or that a mileage raise on a portion of the passenger traffic was in contemplation. On the contrary, they rather indicate that, at the time Congress passed the control Act, there was no immediate necessity for increased revenues, and that, if such necessity should arise, it was contemplated that it could be fully met by applying the remedy which had so recently been sought, and without making possible a general repeal of

numerous laws of sovereign states whenever, in the judgment of the Director General, such repeal might seem to be desirable for reasons apart from military efficiency or even to enable the exercise of an unhampered control of interstate commerce.

The requirement that the Interstate Commerce Commission shall take into consideration "the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition" does not, in our opinion, broaden the authority of the Director General or the Interstate Commerce Commission except where it may be sought to correct conditions incom-
54 patible with a unified system and which were probably due to previous unwholesome competition.

The congressional debates affirmatively disclose that the propriety of compelling the patrons of the railroads to pay all additional costs incident to Federal control was considered and weighed as against the plan of meeting prospective deficiencies, in part at least, by congressional appropriation. The question is one with which Congress might well be concerned, for upon its decision would depend whether additional burdens directly due to the war are to be borne by taxation, or whether the particular burden must be borne by those who use the service,—a service which has been inextricably interwoven into the business fabric of the nation. In the act it is clearly contemplated that only such added burden may be placed upon the traffic as is "fairly chargeable to railroad operating expenses," and the President is also authorized to meet defficiencies from the appropriation. The act, as we view it, is neither a revenue measure nor a general license to supplant pre-existing regulations made by competent authority.

Another significant fact which is disclosed by a study of the Congressional debate upon the subject of the rate-fixing power is that all of the discussion of Section 10, pertaining to the power given the President to initiate rates, concerns only the merits of that proposal as compared with a proposal to vest the power directly in the Interstate Commerce Commission, so that it might continue to exercise, in but slightly modified form the authority previously vested in it. Nowhere was it suggested that the powers of the commission should be extended to embrace original regulations of intrastate rates, nor was it ever intimated, so far as our observation goes, that the powers contended for were being vested in the executive.

Being of the opinion that the rate statutes of this state and the tariffs on file with the State Railroad Commission, in accordance with statutory requirements, insofar as they pertain to intrastate commerce, have not been lawfully superseded by any competent order made by the Director General under the Rail Control Act, and particularly by General Order Number Twenty-Eight, a writ will issue in accordance with the views expressed in the foregoing opinion.

L. E. BIRDZELL.

J. E. ROBINSON.
A. M. CHRISTIANSON.

55 STATE ex Rel.

v.

NORTHERN PACIFIC et al.

J. E. Robinson.

ROBINSON, *J.* (concurring specially):

This is an action by the State of North Dakota against several railway carriers and those who control and operate the railways, to prevent them from continuing to rob the people by the exaction of excessive passenger and freight rates, contrary to the laws of the State. The right of action arises under the constitution and laws of the State, and not under the laws of the United States. Hence, the jurisdiction of the Court is in no way questionable, and it is expressly and fully conceded. In the operation of the public highways between points within the State there must be a compliance with the laws of the State, or the laws are not laws, and the courts must maintain and uphold the laws of the State and protect the people from plunder and robbery in any form, or else the Courts are mere cravens and not Courts.

The claim is that the railroads are operated under acts of Congress, by direction of the President, and his appointed Director General, and it is conceded that the operation is not in accordance with the laws of the State. As it appears, on every railroad and system of railroads in the United States, extending over about four hundred thousand miles, the passenger fares and freight rates have been advanced from twenty-five to fifty per cent. The advance was made as a war measure under the plea of military necessity, but now, in this year of peace, it is continued in defiance of the just laws and powers of the several states. The assumed railroad control and the orders of the President are based on two acts of Congress: In August, 1916, at the time of some trouble with Mexico, Congress passed an act as follows: "The President in time of war is empowered, through the Secretary of War, to take possession and control of any system of transportation and to utilize the same for the transportation of troops, war material and equipments." This was a nice rider on the army appropriation act, covering forty-eight pages of the statute. (Vol. 39, p. 645). The rider is short and simple. Its manifest purpose was to authorize the President in time of war to use the military force to control and operate railroads for the removal
56 of troops and war supplies—"only that and nothing more."

But, in December, 1917, after Congress had declared war against Germany and Austria, the President magnified his power and issued a fiat or proclamation assuming the possession and control of all railroads for all purposes, regardless of any military necessity. The fiat decreed that the possession and control should be in his famous son-in-law, as Director General. By the same fiat the President attempted to legislate and he decreed that except with the

written consent of the Director General, no attachment by mesne process or by execution should be levied on the property of the railway carriers; that no suit may be brought against them, except as permitted by the general or special order of the Director. By this order the President innocently attempted to repeal or suspend a vast system of Federal and state laws and constitutions and to make his famous son-in-law the greatest dictator on earth. But, in March, 1918, Congress passed the Federal Control Act, which expressly repealed the legislative part of the fiat. The act provides this: That actions at law and suits in equity may be brought by and against such carriers and judgments rendered in actions at law or suits in equity against the carriers. And that no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Government. Under that act it is manifest that wrongdoers who control a common carrier and exact excessive rates and fares in defiance of the laws of the state cannot defend themselves on the ground that in so doing they are an agency of the Government.

Section 10 of the act provides the President may initiate rates, fares and charges by filing the same with the Interstate Commerce Commission and "that said rates, fares and charges must be just and reasonable. Also, that on complaint the justness and reasonableness of such rates may be determined by the Interstate Commerce Commission in accordance with the Act to Regulate Commerce, as amended. But as the act of commerce gave the Commission no power to regulate rates between any two points or places of a state, it must be that the Federal Control Act refers only to inter-
57 state rates. Congress did not contemplate that the President or his Director General should attempt to initiate intrastate rates, contrary to the laws of any state. Certain it was not within the power or the purpose of Congress to give the President and his famous son-in-law the right to repeal and undo the rate laws of any state. That is shown to a demonstration by section 15 of the act:

"Section 15. Nothing in this act shall be construed to repeal, impair or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks or bonds."

Now in reading Section 15, some question may arise as to what is meant by the lawful police power of the several states. Does it include the rate making power; does it include a power to prevent the people from being robbed by the excessive rates and exactions of carriers or by those in control of them? Clearly the purpose of police laws and police powers is to prevent filching, robberies and holdups, to protect life, liberty and property. So far as a man is dispossessed of his property, his means of living are impaired. "You do take my life when you do take the means whereby I live." The carrier is employed by the force of necessity. When the employer is forced to pay excessive rates, then, to the extent of the excess, he is filched, robbed and held up. "Such is the scope of police power

that it extends to the protection of the lives, health, comfort and quiet of all persons and the protection of all property within the state." (8 Cyc. 864). Under the police power the legislature may enact just laws that common carriers shall not charge more than certain maximum rates. In every state such laws have been passed and have been uniformly sustained by the highest courts. (8 Cyc. 874). Hence it is that nothing in the Federal act must be so construed as to amend, repeal, impair or affect the lawful police regulations of the several states.

As the Federal Control bill was first submitted to Congress
58 it was strictly an administration measure, conforming to the proclamation of the President, but in each House, and in conference, it was carefully considered and finally passed with salutary amendments, and among them the last and most important was Section 15. While the act empowered the President to initiate interstate commerce rates, subject to review by the Commission, it expressly provided that the rates should be just and reasonable. It did not contemplate the addition of a billion dollars a year to the burden of the wealth producers by a general and uniform advance of fifty per cent. on all rates and fares. And this Court may well take official notice of that fact that such an advance was not just or reasonable; that it was contrary to a recent and prior ruling of the Interstate Commerce Commission refusing to permit an advance of fifteen per cent.

It was in the Spring of 1918, when the food supplies were reduced and when the people were contributing their utmost to the war fund, that Congress gave the carriers half a billion dollars, and then, by advance rates, the Director General gave them one billion dollars. Without any such advance James Hill run his railroads and in the course of a few years he saved up for himself and heirs over one hundred millions of dollars, besides good sums for many others. Under the former rates in a few decades the rail carriers succeeded in filching from the people ten per cent or one-tenth of the total wealth of the nation.

There is no reason extending the discussion. It is a well known fact that the rail carriers have always charged excessive rates and that they are fast amassing the wealth of the country. By skill, prudence and economy the Director General might well have reduced the cost of operating the railroads, and indeed, when the Federal Control bill was before Congress, he was called as a witness and gave assurance that the result of Federal control would be to reduce the expenses—and such was the assurances under which the bill was passed. The Director could well have reduced the burden of rates and fares instead of advancing them, however that may be, now that the war has ended, there is no longer any reason or excuse
59 for any person on earth to operate railways in disregard and defiance of the lawful police regulations of the several states. It is beyond the constitutional power of Congress and the National Government, and so far as persisted in, it must lead to anarchy, Bolshevism and endanger the safety of the Republic. Mandamus awarded.

J. E. ROBINSON, *Judges.*

60 STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER

v.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER B. HINES, Director General of Railroads.

GRACE, *J.* (dissenting):

An alternative writ of mandamus was issued out of this court. The purpose of such writ is to command and prohibit the defendants from collecting increased fares or rates over and above those stated in certain schedules on file with the Board of Railroad Commissioners of this state for carrying passengers, freight and baggage between intrastate points, or to show cause why the rates, fares and charges specified in said schedules should not be in force instead of the increased rates initiated by the President of the United States and which are now being charged and collected. Walker B. Hines is the direct representative of the President of the United States and together they represent the United States, so that, in fact, the action is one of the State of North Dakota against the United States to determine the authority of the defendant to initiate and collect the rates complained of.

Congress passed an act which was approved August 29th, 1916, by which the President, in time of war, is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material and equipment or for such other purposes connected with the emergency as may be needful or desirable. Congress, by an act of March 21st, 1918, gave the President, during time of war, control of all traffic over systems of transportation with exclusive power to initiate rates, fares and charges by filing them with the Interstate Commerce Commission within the time and manner specified in the act under consideration. Congress in the exefcise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives on the 6th day of April, 1917, formally declared war against the Imperial German Government; in such resolution, Con-
61 gress authorized and directed the President to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government, and to bring the conflict to a successful termination, Congress pledged all of the resources of the United States. On December 7, 1917, the Congress of the United States, by resolution, declared war to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government, and this resolution contains the same authority and direction to the President as is contained in the resolution wherein war was formally declared against the Imperial German Government, with reference to the employment of the entire naval and military forces of the United States and the resources thereof, and the pledge of all the resources of the

United States to bringing the conflict to a successful termination. Under and by virtue of the authority vested in the President of the United States by authority of the act of August 29, 1916, he did through Newton D. Baker, Secretary of War, take possession of and assume control at twelve o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States, as is more fully shown and set forth in the proclamation at that time by the President of the United States duly issued and published. By this proclamation was not taken over electric passenger or interurban railways, but the right was reserved by subsequent order or proclamation to do so if it were found necessary or desirable. It was further stated in the proclamation that by subsequent order and proclamation, possession, control and operation in whole or in part might be relinquished to the owners of the railroad systems *of* railroad and water systems, the possession and control of which had been assumed. Congress, on March 21st, 1918, approved the act for the operation of transportation systems while under federal control which provided for the just compensation of their owners and for other purposes.

The construction of certain sections of this act is the task
62 with which we are confronted. For the purpose of properly construing the Federal Control Act and war powers of the President, it would be well to mentally place ourselves back to the 28th day of December, 1917, and from thence look forward into the future as it then presented itself; instead of looking from the point where we now are retrospectively to the 28th day of December, 1917. If we should do this, we would realize that transportation for war purposes and as a whole under private control had largely become inefficient; that at such time there were millions of soldiers to be transferred to training camps; that millions upon millions of tons of war material were to be transported from the place where produced to the place of manufacture and the finished product again to be transported; that millions of tons of food stuffs and clothing had to be transported to the various places where the soldiers were in camps for their use. The magnitude of transportation for war purposes alone was so stupendous that it is almost beyond the comprehension of those not so situated as to have an opportunity to acquaint themselves with the immensity of the task of the transportation of the necessities of war. It must be remembered that all of this was an added burden to the transportation facilities of our country. Again, we think it is a matter of common knowledge that the transportation systems, prior to the declaration of war and prior to the time the almost illimitable amount of war transportation was added to the work of the transportation companies, were finding difficulty in properly handling and transporting the products of trade, production and manufacture which were tendered them for transportation during times of peace. It is apparent, therefore, that federal control was taken for the purpose of facilitating transportation and systematizing it to the end that transportation systems, under federal control, would be efficiently reorganized so that more service could be

rendered by them and much more material transported over them.

We must also keep in view the fact that when war is once officially declared by the duly constituted authorities of the United States with whom the power is placed, by the constitution, to declare war, that a state of war continues to exist until a treaty of peace is signed
63 with those against whom war was declared and until such treaty of peace by the president's proclamation is duly proclaimed. The President having by due proclamation taken over the transportation companies, each and every official and employee and all those who entered the employ of the transportation companies after being taken over by the federal government were thereafter by proper authority duly constituted and made officials and employees of the federal government, and, as such, were employed and paid by the federal government. With these preliminary observations, we may proceed to examine some of the real issues presented in this case. The paramount issue presented is that which relates to .

A Conflict of Power.

The conflict of power arises between certain tribunals, as state railroad commissions, possibly the Interstate Commerce Commission, and the powers conferred upon the President under the Federal Control Act, or possibly other war powers possessed by the President, as to which has the lawful authority to fix passenger and freight rates and other charges during the time of the war, on intrastate commerce. We think in -his discussion it will not be necessary to advert to other war powers possessed by the President than those conferred upon him by the Federal Control Act. In time of peace, it may be conceded that certain state tribunals, as the state railroad commission, have the exclusive power to fix all intrastate rates of transportation, likewise the Interstate Commerce Commission, in time of peace, has exclusive power to determine the reasonableness and justness of rates affecting interstate commerce, and since the act of the Interstate Commerce was amended, the power to prescribe rates and the power to prescribe an intrastate rate where that rate is such as to cause a discrimination in an interstate rate between a point or points within the state to a point or points without the state. These constitute the general powers of such tribunals in time of peace. They are such powers, however, as are intended to be exercised only in times of peace, with the exception that Interstate Commerce retains power, in the act under consideration, upon complaint being made, to pass upon the reasonableness and justness of rates initiated in war times by the Presi-
64 dent, and, with this single exception, all other powers with reference to rate making and the fixing of charges and fares for transportation systems are, by the Federal Control Act, suspended during time of war; such power is supplanted, for the time of war, by the power of the President to initiate rates, which when initiated by him become binding and effective as to every kind of transportation from the time they are filed with the Interstate Commerce Commission, and are subject to no change except, upon complaint to the Interstate Commerce Commission, such rates and fares may be ex-

amined as to their reasonableness and justness which must be determined upon the conditions which exist in time of war and not those of peace. With this exception, there is no limitation upon the power of the President with reference to the initiation of rates, charges and fares. The power of the President under the Federal Control Act to initiate rates, fares and charges contains no limitation as to kind, and extends equally to interstate and intrastate fares, rates and charges. The Federal Control Act contains no limitation other than as above stated. It is claimed there is a limitation by Section 15, but we will disprove this contention later in this opinion.

The power conferred upon the President by the Federal Control Act with reference to rates was intended to be a power with which there could be no interference, with the exception of that of the Interstate Commerce as to the reasonableness and justness thereof. The power was intended by Congress to be one which would enable the President by use thereof to accomplish without delay or interference the objects intended to be accomplished by the Federal Control Act. If this be true, then the rate making powers of all other tribunals must be suspended during the time of war, including that of the Interstate Commerce Commission, except as it is preserved in the Federal Control Act. If, as is contended by plaintiff, the power to initiate and prescribe rates as to intrastate remained the same in time of war as in time of peace, then it would be within the power of the state or states, through the railroad commissions, or rate making power within the state to make any power conferred upon the President by the
63 Federal Control Act an empty, impotent power. The President having at a certain date advanced the freight rate twenty-five per cent on all freight thereafter carried by the transportation systems within the continental United States, the effect would be to increase the intrastate rate twenty-five per cent. Let us assume that, after the President had initiated such advanced freight rate, each state railroad commission should thereafter proceed to fix the intrastate freight rates and readjust them and that the final result of their deliberations resulted in a decrease of intrastate freight charges of thirty-five per cent; it is not difficult to comprehend that if such could be the case, the advanced freight rate so initiated by the President of the United States for a war purpose, at least in part would fail of accomplishing the purpose for which it was intended, and in this discussion it must be assumed that the President would not advance the rate any more than the necessity of war required. The twenty-five per cent advance of freight rates initiated by the President did affect all freight and was chargeable upon all freight both intrastate and interstate. If, as contended by the plaintiff, the power to fix intrastate rates remained during time of war, unimpaired by the order of the President which made the twenty-five per cent increase in intrastate freight rates, and if such order of the President was subordinate to the power of the railroad commission of the state to prescribe the intrastate rate and determine its reasonableness and justness, under this contention, before the President could make effective the said increase on intrastate rates, it would be necessary for him to procure the assent of the rate making power of each state before he would have power to in-

crease the intrastate freight rate in the manner in which it was increased. If the President were required to do this, it might take a long period of time before the President would get the rate making power of each state to approve of the intrastate rate initiated by him. If the State, in war time and in the light of the Federal Control Act, possesses the power above claimed for it, such power would constitute a limitation on the right of the President to initiate rates and
66 fares and the possession and use of such power by the state, in time of war, could not but affect the transportation of troops, war material and government supplies and, in addition to this, have a general tendency to decrease the efficiency of the systems of transportation in general.

We are satisfied that during war time, in view of the Federal Control Act, no state tribunal has any authority to initiate, prescribe, determine or fix an intrastate rate; that by the Federal Control Act, during the time of war, the power to fix rates and charges both interstate and intrastate was placed exclusively with the President and he has the exclusive power to initiate them, no other power can initiate rates or charges, and such rates and charges as he does initiate under such power can only be examined as to their reasonableness and justness by the Interstate Commerce Commission. The Federal Control Act was meant by Congress to become effective at once and to become an effective means in the hands of the President, whereby he could wholly control and operate the transportation systems of the United States, including the exclusive power to initiate rates and charges for transportation. Congress did not intend that the President in time of war should be hampered nor delayed in any manner in the control and operation of transportation systems so taken over, and, for that very reason, placed the exclusive power to initiate the rates and charges with him; and in order that the President might immediately proceed in such matters and make the transportation companies more efficient and that such powers might be at once exercised, it was declared that the act in question was emergency legislation, and that fact is evidence that it was the intention of Congress that all powers therein conferred by Congress upon the President were to be exercised by him promptly and without delay; this was indisputably necessary by reason of the pressing necessities then existing for immediate efficient transportation. The power to initiate all rates and charges was lodged with him during the time of war, thus removing from his path the power of state tribunals, such as railroad commissions, during such time, to interfere with the rates or charges for transportation initiated by
67 the President.

It must also be remembered, in construing the Federal Control Act and the President's right to initiate an increase of twenty-five per cent in the freight rate, that certain conditions existed of which the following may be mentioned: the large increase in the wages of thousands upon thousands of employees who were operating the transportation systems while under Federal control, the millions of dollars that must be expended to rehabilitate the transportation systems to make them more efficient in transportation,

the accumulation of a reserve fund to insure a ready means to maintain the efficiency of the system, and many other matters we might mention which would demonstrate the necessity of an increased rate or charge. It must follow that the power to initiate and make effective such increased rates or charges in time of war and in view of the immediate necessity, must be lodged where it could be exercised immediately and where the exercise of it could not be delayed by agencies such as a state railroad commission, which had theretofore exercised such power. Hence, the power to initiate rates and charges, either passenger or freight, of the transportation systems was exclusively, by the Federal Control Act, placed with the President with no limitation other than, upon complaint, an examination might be had of them before the Interstate Commerce Commission to determine the reasonableness or justness thereof. We think the interpretation we have so far given the act in question is correct. We are strengthened in this assumption by the contemporaneous construction given the act by those upon whom devolved the duty of interpreting and enforcing the act and also by the interpretation given the act by those who were affected by it; during all the time of the operation of the act until the present time neither the railroad commission of any state nor shippers nor anyone compelled to pay the increased interstate or intrastate rate has made any complaint. They and all persons affected by the act have uniformly placed the same construction upon it as the President of the United States did. They have acquiesced in the construction thus placed upon it by the President of the United States and those charged with its
68 enforcement. The act being one the powers of which the President was to execute his acts thereunder must be considered executive acts. It must be conceded that he used his best executive discretion in the execution of such powers and this being true, the court should be reluctant to interfere with his exercise of such discretion.

The most important remaining point to be discussed is the meaning of Section 15, which is to the effect that nothing in the act shall be construed to amend, repel, impair or affect the existing laws or powers of the state in relation to taxation or the lawful police regulations of the several states except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds. It is claimed by the state that the power to prescribe or initiate a rate or charge for transportation is a police power. Assuming that to be true and assume, further, that every state law, to a greater or lesser extent, is a police power in that, in some degree either present or remote, it may affect the health, safety and morals of the people of the state, it is clear that as the term is used in Section 15, it has no such extended meaning. What is intended by the words "police regulations" as used in Section 15; are those police regulations with which all are familiar, those which it can readily be understood have a direct relation to the health, safety or morals of the people? The words are susceptible of two uses: one broad and comprehensive, the other narrow and restrictive. If we speak of the initiation or regu-

lation of rates and charges as a police regulation or a police power, the use is in the broad and comprehensive sense; when we say that the police powers are as broad as the sovereignty of a state, this is the most comprehensive sense; but, as the words are generally used and commonly understood by the great mass of people within the state or within the nation, they have a restricted meaning and mean only such police powers or regulations as exist for the purpose of directly protecting the health, safety or morals of the people. For instance, a police regulation which prescribes quarantine in case of smallpox or other contagious or infectious disease, is a police regulation which acts directly to protect the health of the people by preventing the spread of the disease; and so an illustration might be given as applying to morals or safety, and it is in this restricted sense that the word is used in Section 15. Certainly the words "police regulations" in Section 15 do not refer to rates, for Congress by Section 10 of the act had wholly disposed of the rate question. It had, by that section, placed the power, during the time of war, exclusively with the President to initiate rates and this meant all rates and every kind of a rate relating to transportation and had it exclusively placed the power during the time of war to review the reasonableness and justness of such rates with the Interstate Commerce Commission.

There is a well-settled rule of statutory construction, which is, that the intention of the whole act will control the interpretation of the parts. Sutherland on Statutory Construction, 319. The intention of the Federal Control Act is easily discerned. It plainly appears from it that it was the intent of Congress to place the control and operation of all transportation systems with the President and that he had full authority to initiate all rates, fares and charges for transportation. This was the cardinal purpose or intent of the whole act. Each part of the act must be construed in harmony with the general intent and cardinal purpose of the act. Section 15, being a part of the act, must be construed so as to harmonize with the general intent and purpose of the act as expressed in it, and which we have above pointed out.

The powers enumerated and granted in the Federal Control Act to the President are wholly and exclusively war powers. When the war shall have been terminated and treaties of peace shall have been signed with those with whom we are at war and when such treaties of peace have been duly proclaimed by the President, we shall then have returned to a state of peace and after the expiration of not more than twenty-one months thereafter the war powers conferred upon the President in the Federal Control Act will not further be effective so long as a state of peace continues. At the expiration of twenty-one months after a treaty of peace has been signed and by the President proclaimed and in the absence of further federal legislation retaining for a longer period of time control of the transportation systems of the United States, or unless the President has theretofore relinquished such federal control, such transportation systems will be returned to their owners and will again become, at that time, subject to the same rates, fares and charges for

transportation as existed at the time the President, by proclamation, took federal control of such transportation systems, and the power to initiate and prescribe fares, rates and charges will again be the same in the states and the Interstate Commerce Commission as existed at the time of the taking of federal control of such systems which powers were, as we have seen, suspended in the manner above stated during the time of war. At such time when such transportation systems are returned to their owners, if they be so returned, all state regulations and powers will be again revived and be of the same force and effect as they were at the time of the taking of federal control. The power of the state at the time of taking of federal control to prescribe fares, rates and charges was not repealed but merely suspended during federal control and, upon the termination of that, will again have the same force and effect as at the time of taking of federal control.

The Federal Control Act is one that conferred upon the President certain rights, authority and power with reference to initiating rates and charges for transportation. If anyone had a just complaint with reference to rates, fares and charges initiated by the President, the act itself prescribed a definite remedy. If complaint were made that the rates and charges and fares were unreasonable, the Interstate Commerce Commission had full power and authority to examine into the complaint with reference to the unreasonableness or unjustness of any fare, rate or charge and it could, after a hearing upon the complaint, fully determine as to the reasonableness or justness of the fare, rate or charge. Thus there was a complete remedy. Where a statute or an act creates a right, authority or power and provides a remedy for its enforcement and provides a remedy for those who may claim to be injuriously affected by it, such remedies are
71 generally held to be exclusive. United States v. Stevenson, 115 U. S. 190; Globe Newspaper Company v. Walker, 210 U. S. 356; Dollar Saving Bank v. United States, 19 Wall. 227.

It is conceded the rates and charges fixed by Order No. 28 have not been scheduled nor filed with the state railroad commission before they were put into effect, as Section 4725 of the Revised Code of North Dakota of 1913 provides; that the schedule of fares, rates and charges under Order 28 were only filed as a matter of courtesy for the use and information of the board of railroad commissioners of North Dakota and not in compliance with Section 4725.

The main contention of plaintiff is that there is no authority for the President under the Federal Control Act to increase rates, fares and charges on transportation which is wholly intrastate. In finally disposing of this matter, as we view it, it must be presumed that the President and every subordinate officer or federal employee acting under his authority, in executing the powers conferred upon him by the Federal Control Act were, at all times, in the execution of such powers, acting in the highest of good faith. It must also be presumed that the President did not initiate a higher fare, rate or charge than was necessary to maintain the efficiency of the transportation systems taken under Federal control and that it was necessary to fix such rates and charges as he did, for the purpose of transporting troops and war material and for the further purpose of maintaining

the efficiency of the transportation systems so that all transportation immediately connected with war purposes might be promptly carried on as well as all other transportation.

The twenty-five per cent increase of freight rates on intrastate commerce in all of the states, we can readily understand would amount to many millions of dollars. It would constitute a substantial part of the amount of revenue raised by the twenty-five per cent increase on all freight. It would constitute a considerable share of the means and funds whereby transportation of every kind could be made efficient. It would constitute a large fund which would assist in paying the hundreds of millions of dollars of increased wages to
72 federal employees of the transportation systems while under federal control and without this large amount the operation of the transportation systems under federal control would be impaired and their efficiency for all purposes decreased, and thus affect the transportation of troops, war materials and government supplies. It seems clear that the act in question is one conferring upon the President war powers. The language of the act is clear and it confers upon the President the exclusive power to initiate all rates upon the transportation systems of the continental United States during the time of federal control and during that time, his right to do so cannot be limited by the state. It is clear that such power included the right to initiate all rates, both on interstate and intrastate commerce, during federal control of the transportation systems and that all such rates should become effective by filing the same with the Interstate Commerce Commission upon one day's notice. If the conclusion at which we have arrived is correct and we think it is, the contentions of the plaintiff cannot be upheld. The writ of mandamus issued by this court should be quashed.

RICHARD H. GRACE.

73 STATE ex Rel. LANGER

v.

DIRECTOR GENERAL.

BRONSON, *J.*:

I dissent. In my opinion the majority opinions wholly ignore the fundamental considerations of law involved in this action. If mandamus is awarded and maintained now, it ought to have been awarded and made effective when the order was first promulgated. During the crucial period of the great war, now ended, this order was in effect and in force without complaint, and with the acquiescence of this state.

The opinion of Judge Birdzell is based upon the broad proposition that the regulatory powers of the state over Intra-state rates were not suspended by the Act of Congress of Mar. 21, 1918, by reason, particularly, of the provisions of Sec. 15 thereof.

Readily, the court may arrive at such a conclusion when it assumes as a premise that the exercise of this war power by Congress

is the exercise of the Common Law Power of Regulation, and not the exercise of that higher power, the sovereign right to operate in war times a governmental instrumentality for war purposes and to prescribe the rates thereof. The purpose- for which the railroads were taken and rates prescribed are disclosed not only by the terms of the Act, but by the actual purposes for which, in fact, the railroads were used and the rates were prescribed.

Upon a priori reasoning, as I view it, Justice Birdzell holds that the intent of Congress in the Act was to prescribe a method of initiating Common Law reasonable rates, by the President instead of by the Railroads themselves, based upon the old theory that the charge made to the public must be reasonable and not discriminatory. It is necessary through this technically narrow construction to virtually read into the Act, Sec. 10 thereof, the following, "the President may initiate Interstate rates, fares, charges etc.," and, also, to virtually read into such Act, in Sec. 15 thereof, "that nothing in this Act shall be construed to amend, repeal, impair or affect the existing laws or powers of the State in relation to taxation, regulation
74 of rates, or the lawful police regulation etc." Congress might have so legislated; but it did not so legislate. It gave to the President direct authority to initiate rates; the term used is broader than Interstate rates. See Employers' Liability Cases, 270 U. S. 463, 500. From the very force of the circumstances then existing with this nation involved in a mighty struggle, in war time, it would seem perfectly obvious that the President, if he were to initiate any rates at all, must initiate rates that applied to both Interstate and Intra-state Commerce. Otherwise the power might as well not have been conferred.

At the time the act of March 21st, 1918 was enacted Congress recognized that certain transportation systems then were being operated as Federal instrumentalities under the terms of a proclamation of the President by which state regulatory powers might be or were subordinated. It knew then that the President through the Director General was exercising the power to route freight and that this necessarily included the power to change the rate to shippers. This regulatory power, if exercised, applied to both interstate and intrastate shipments. In such act of March 21st, 1918 Congress specifically required the Commerce Commission to give due consideration to the fact that the transportation systems then were being operated under a unified and co-ordinated National control and not in competition. In the Minnesota rate case, (230 U. S. 352, 417) the U. S. Supreme Court in considering the then Federal Statute concerning the powers of the Commerce Commission, stated, "Neither by the original act nor by the amendment did Congress seek to establish a unified control over interstate and intra-state commerce." In such act Congress further required the Commission to give due consideration to the certificate of the President, when made, that increased railway opration revenues are necessary in order to pay the expenses of Federal control and operation, etc., to the carriers operating as a unit. Although Congress retained the machinery of the Commerce Commission to preserve the reasonable and just character of Federal rates, as

much as possible, it nevertheless appears reasonably clear that Congress recognizing the exclusive Federal control in operation,
75 both interstate and intra-state then existing, meant and intended to give a corollary and additional war power of exclusive rate making over such systems under Federal control by which alone a unified and co-ordinated national control and operation could be effected. There is no question that the President has so interpreted such power and this executive interpretation should not be lightly considered. Justice Birdzell attacks in his opinion the reasonableness of the rate promulgated as applied to Intra-state Commerce and holds that prima facie, it is discriminatory, and therefore not justified. This argument begs the very question upon which the logic of his decision is founded, namely that the power exercised, is the power to regulate rates in Interstate Commerce as a Common Law power; he argues that the rate promulgated does not purport to be promulgated for the purpose of obviating discrimination in Intra-state Commerce; he must concede that it was, in fact, applied to both Interstate and Intra-state Commerce. If such power be the sovereign power in war times to prescribe rates, the regulatory power of the States does not obtain; if it be as contended by the majority opinion, the power to regulate the Common Law obligation of carriers concerning rates, then no attempt by any one has been made to subject these rates, so promulgated, to review before the Commission which has jurisdiction thereof. Surely, under the authorities quoted in the majority opinion, Congress had authority to grant to the President and the Interstate Commerce Commission the right to initiate, or review a Common Law rate in Interstate Commerce and to give authority to the Interstate Commerce Commission and the President, as the initiating power, to so prescribe an Intra-state rate which would not, by its terms, or by its effect, serve to interfere with, or impede Interstate Commerce.

It is also worthy of consideration to note that under the State Law, (Art. 21, of Ch. 14, G. L. 1913) the Railroad Commissioners of the State simply review, investigate, or determine a rate theretofore established by the common carriers. Even under the State law the common carriers initiate a rate except statutory prescribed maximum rates. The whole act looks to an exercise of jurisdiction over
76 a private corporation operating a railroad as a common carrier. Now, either under the State Act, or under the present Federal Act can such private corporation, for instance, the defendant railroad herein, initiate a rate, or file a schedule? How, further, under the State Law is any jurisdiction of any kind conferred over or concerning the President in the exercise of his power to prescribe rates? Are we to understand from the majority opinion that it is now the duty of the private corporation owning the railroad, but not having the control or the operation of the same, to initiate intrastate rates within the State, and the duty of the President to initiate rates over the same railroad within the State upon Interstate Commerce?

The opinion of Justice Robinson, by reason of which only the sanction of the court is given for a writ of mandamus herein, needs little comment. It contains no legal discussion. It gives no con-

sideration to the war power of Congress or of the President, or of the necessities of this nation in a time of war to utilize under the war power, every resource of man and property in the nation. It is merely a diatribe attempting to ridicule our Federal Government for its action taken, and for its alleged lack of economy concerning the operation of railroads under Federal control in times of stress and of war necessity. It is rather unfortunate that it happens in this action, the court being so divided, that a writ of mandamus is awarded against our Federal Government, based upon an opinion, (which under the circumstances is the controlling factor), directed rather to a discussion of the faults of railway operation, and of principles of expediency, rather than of law and of the war powers and necessities of this nation in war times.

My views upon this matter are expressed in the following opinion prepared in advance of the majority opinions of the court now presented, and to the views therein expressed, I still adhere. They are therefore hereinafter set forth.

77 STATE ex Rel. LANGER

v.

DIRECTOR GENERAL.

BRONSON, *J.*:

This is an original proceeding instituted upon the relation of William Langer, the Attorney General, against the Northern Pacific Railway Co., and the Director General of Railroads, seeking a writ of mandamus from this court to enjoin the defendants from collecting or enforcing the schedule of freight rates, and passenger fares and charges promulgated, and put in force and operation by the Director General pursuant to general order No. 28, issued May 25, 1918, so far as the same applies to Intra-state Traffic in the state of North Dakota.

The petition of the relator in substance alleges: That the President of the United States assumed control of the Railroad in question, under the act of Congress, Aug 29, 1916.

That, pursuant thereto, on Dec. 26, 1917, the President issued his proclamation for Federal control, and created the office of Director General to operate the Railroads, and that they have been so operated through the Director General since Jan. 1st, 1918.

That, on Mar. 21, 1918, Congress enacted the Federal Control Act, providing for the compensation, operation, and rehabilitation of transportation lines.

That, on May 25, 1918, the Director General issued general order No. 28 whereby on June 10, 1918, certain increased passenger fares, and baggage charges, and on June 25, 1918, certain increased freight rates were promulgated, and put in force upon transportation lines, including the defendant Railway Co.

That, by reason thereof, freight rates in the state of North Dakota were increased 25% and passenger rates from 2½c. per mile to

3c. per mile. That the Constitution of this state, Sec. 82, provides for the location of a board of Railway Commissioners, and that such board always, in this state, has exercised supervision and con-
78 trol over transportation systems operating in, and through the state as to intra-state rates and service. That Sec. 4725, C. L. 1913, provides that no Railway corporation may change its fares, rates, or charges for service without first filing such schedule of fares, rates, and charges with such board, ten days before the same became effective, and that the Railway Co. therefore, pursuant to such statute had filed a schedule of fares, rates and charges with such board, and that no petition of complaint was filed with the board by such Company since such date, asking for any increase in such rates within the state of North Dakota: that the schedule of rates so promulgated, and so put in force by the Director General are without authorization pursuant to the acts of Congress, and the proclamation of the President, and that the same do not affect the Government transportation of troops, war materials or Government supplies, or the issue of stocks and bonds; that the same are unreasonable and excessive and constitute an illegal burden upon the patrons of the Railroad Co.; that they are against the public welfare, convenience and business interest of the state and contrary to the law of the state.

The answer and return of the Director General admits that the Railway Co. owns the transportation line involved, and that it is an instrumentality both of state and intra-state commerce: it specifically denies that the company has operated its system since Dec. 25, 1917. It specifically alleges that the Director General has exercised possession and control over the transportation line involved pursuant to the acts of Congress and of the President of the United States. It specifically alleges that the Director General, pursuant to general order No. 28 put into full force and effect and applied the said schedule of rates and charges, and specifically denies that the Railway Co. did put the same in force and effect to apply to intra-state business in North Dakota; it specifically alleges that on April 6, 1917, the Federal Congress declared a state of war to exist between the United States and the imperial German Government; that pursuant to gen-
79 eral order No. 28, the Director General, having duly filed the same with the intra-state Commerce Commission, made effective the increased rates, fares and charges, provided in said order between points in North Dakota as well as between other points along its line, and that the same are still in effect and force and the transportation line in question has been and is now conducted, and the collection of such rates, fares, and charges has been made, by and in the name of the Director General of Railroads.

The Railroad Company interposed a separate answer or return alleging, in substance, that since Dec. 28, 1918, the possession and control of its transportation system has been under the President of the United States, and that all of its officers, directors and agents are under the direction of the United States Government, and not of the Railroad, and further that it did not put in force or effect the

schedules complained of, and that the same were so put into effect under the sole authority of the Director General.

Upon these pleadings of the parties, the only issues presented to this court are the questions of law that arise upon such pleadings. There is no question presented to this court for its determination as to whether the schedules in force are in fact excessive or unreasonable: nor is there any question presented of discriminatory acts by the Director General, or the Railway Co. in operating the transportation line under general order No. 28. There is likewise no question presented to this court concerning its jurisdiction to grant the relief sought, so far as it might be contended that the acts in question are those of the Director General, and not those of the carrier, for the reason that the Director General expressly wa-ves this question. The proceeding therefor- is before this court upon its merits upon the sole question of law, to wit: The legal authority of the Director General of Railroads to maintain in force and effect the schedule of increased rates, charges and fares promulgated upon and
80 effecting intra-state traffic in the state, contrary to the law of the state, without the supervising control or direction of the board of Railroad Commissioners.

The century old controversy of the rights of Federal Government and of the state in the exercising of their respective sovereign functions is again involved.

In determining the exercise of the power complained against herein, the following questions present themselves for consideration:

1. The power of Congress to authorize the Federal control and operation of the Railway Transportation lines as assumed.

2. The authority of Congress to prescribe or regulate rates on such transportation systems so taken.

3. Whether the power granted to the President to initiate rates is a delegation of legislative power.

4. Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal agency for purposes of operation and rate making.

5. The power of the State to exercise, under its laws and police regulations, the rate making power over intra-state traffic upon railways under Federal control.

6. Whether the emergency for which the Congressional acts were enacted has passed and the powers conferred thereunder are now ineffective.

The legal consideration of these questions *are* determinative of the issue presented in this proceeding: They will therefore be considered separately.

1. The Authority of Congress to assume control of Transportation Lines:

It will scarcely now be denied that Congress has the power to enact legislation to effect a Governmental control over the transportation line envolved. The state rather so conce-des the power: This power may be drawn from its powers, to declare war, raise and support armies and to make all laws necessary and proper therefor,

or from the power to regulate interstate commerce, or even,
81 to establish post roads. (Art. 1, Sec. 8 Const.)

Concerning these war powers, Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, the court said:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

In Pappens v. United States, (C. C. A.) 252 Fed. 55, the court said:

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Under the power to regulate interstate commerce or to establish post roads, Congress has undoubtedly the power to construct, maintain or operate a transportation line.

In Wilson v. Shaw, 204 U. S. 24, an action brought to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of the Panama Canal etc., the Plaintiff contended that the Government had no authority to engage anywhere in the work of constructing a Railway or Canal. Justice Brewer, in holding that the decisions of the Court were to the contrary, quoted from California v. Pacific Railway Company, 127 U. S. 1, 39, as follows: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accomodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consider-
82 ation of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of

course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations."

So, in Luxton v. North River Bridge Company, 153 U. S. 525, Justice Gray stated as follows:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States. McCulloch v. Maryland, 4 Wheat. 316, 411, 422; Osborn v. Bank of United States, 9 Wheat. 738, 861, 873; Pacific Railroad Removal cases, 115 U. S. 1, 18; California v. Pacific Railroad, 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several States. See Indiana v. United States, 148 U. S. 148."

Justice Brewer, with reference to the contentions of the plaintiff that these decisions were obiter dicta, stated that plainly they were not; that they announced distinctly the opinion of the Supreme Court on the question presented; that Congress had acted in reliance upon such decision in many ways, and, that the Court adhered to the principles stated. (204 U. S. 24.)

Concerning the war powers, it is stated in Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, as follows:

"The Constitution gives to Congress the power to declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the Commander in Chief of the army and navy, and of the militia of the several States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrections, are not defined. The decision of all such questions rests wholly in the discretion of those to whom
83 the substantial powers involved are confided by the Constitution."

Concerning the authority of Congress to make all laws which will be necessary and proper to carry into execution the express powers granted, Chief Justice Marshall, in M'Culloch v. Maryland, 4 Wheat. 4. L. Ed. 605, stated:

"But we think the sound construction of the constitution must allow to the national legislature the discretion, with respect to the means by which the powers it confers are to be carried into execu-

tion, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adpated to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The U. S. District Attorney for this State, of counsel for the Director General, contends that the President could have taken over the railroads, as a war measure, without any acts of Congress, and that the State cannot interfere with his management or use of the road.

Congress, having ample Constitutional powers concerning the subject matter, it is unnecessary to consider the war power of the President to take such property without the authority of Congress. This question was raised in Civil War times when Congress enacted the statute authorizing the President to take over Railroads, and transportation lines whenever the public safety required. 12 Stat. L. 334; C. Haney Congressional History of Railroads, Vol. 11, 158.

84 #2. The Authority of Congress to Prescribe or Regulate Rates on Transportation Systems:

Does Congress possess the constitutional power to fix or prescribe rates of Federal making which may supersede or subordinate intrastate rate regulations? A discrimination may be drawn between the powers of rate making and of operation; they may be classed, in many respects, as separate and distinct functions. The power to operate, however, with respect to the effciency of operation, and the prompt movement of traffic may depend largely upon the rate prescribed: the rate prescribed may facilitate, deter or even prohibit the movement of certain traffic. Revenues, when dependant upon rates may vitally affect the operation of transportation systems. If Congress possesses the power to control or operate a railroad transportation system, it must necessarily be conceded that it possesses, likewise, the power to prescribe or to fix a method of fixing rates to be charged for the service rendered in operating a governmental instrumentality. Whether this power flows from the exercise of the Constitutional War Power, or from the exercise of the Constitutional power to establish post roads, or regulate Interstate Commerce, in any case, the authority necessarily exists as essentially implied in the execution of the power. It exists, concededly so, in the Federal operation of Post Offices, and of the Parcel Post. (In re Jackson, 6 Otto. 727, 24 L. Ed. 877.), in the control and management of the Panama Canal, (32 Stat. L. 481, 34 Stat. L. 51), and in various other Federal instrumentalities.

The question involved is not the power of regulation, but the power concerned with operation. The common law obligation is imposed upon the common carrier to make charges reasonable and just. This obligation is subject to regulation by the sovereign power; the legislative sovereign will may prescribe this common law obligation, a rule of conduct, and fix a rate. (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, 87.) In the above case Justice Waite stated:

85 "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine

what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be Juris Privati only." This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise De Portibus Maris, 1, Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

See Watkins on Shippers and Carriers Sec. 61 (2nd Ed.).

When, however, the public itself, through its government assumes management, or exercises proprietary control over such property as an instrumentality, or agency of the Government, the very reason for the regulation disappears; there then exists a merger of the interests of the owner and his patrons. Then, in theory of law, the property, theretofore privately owned and operated but affected with a public interest, subject to regulation for the common good, is now operated and maintained as a governmental agency for the common good. The legislative will may then prescribe a rate for the governmental service to be rendered regardless of the Common Law obligations of a Common Carrier; The exercise of such power becomes similar to the power to tax; The Federal Constitution does provide that duties, imposts and excises shall be uniform; it contains no inhibition against discriminatory rates; the equality clause of the 14th. amendment applies to States only. It is therefore, readily appreciated that the power of the States to prescribe or regulate the rates intra-state, of a common carrier privately owned and operated is entirely a different power than the power of the State to prescribe or regulate rates upon or over a Federally owned or operated common carrier. In observing the distinction, no one will

86 contend that this State, under its right to regulate rates, possesses any authority to regulate, or review the charges made by the Federal Government, for carrying, or delivering a letter, or parcel post package through the United States mail intra-state. The argument presented by the State that the police powers of the State cannot be surrendered and that the supervising of Railroad rates is a police regulation within the police powers, does not apply to the question presented. It is unnecessary to consider whether the exercise of the rate making power is within the police power, for clearly the police powers of the State do not apply to a Federal instrumentality when Congress has specifically legislated concerning the exercise thereof. Furthermore, under the power to regulate interstate commerce, the plenary power of Congress concerning such matters, to the exclusion of the rights of the State, is recognized in the cases cited by the State.

In the Minnesota Rate Case, 230, U. S. 352, the right of the State to exercise its regulatory powers over intra-state rates was expressly based upon the principle that Congress had not taken from the State this power. In the Shreveport case; 234, U. S. 234, the principle was recognized that Congress had paramount power with reference to interstate Commerce and the regulation thereof, but that this did not mean that Congress possessed any authority to regulate the internal affairs of a State.

Likewise, in the Keokuk case, 235 U. S. 493, and in the Caldwell case, 244, U. S. 617, the power of the Interstate Commerce Commission was restricted within the limits which requires a definite showing of interference with the interstate rate prescribed.

Likewise, in the Union Pacific cases, (9 Wall. 579, 75 U. S. 792) (85 U. S. 5, 21 L. Ed. 877) (3 Fed. 106) (25 Fed. 728) the right of the State to tax the property of the Union Pacific Railway Co. to subject its property to the right of eminent domain of the State, or to affect a physical connection with another Railroad, was conceded upon the basic holding that such railway was a private corpo-

87 ration, with property of its own, and that it was not a Federal instrumentality, except as Congress had made it so for special purposes, and it not being shown that the action of the State interfered with any of these specific purposes, which Congress had required it to fulfill, the sovereign right of the State could act.

It clearly follows, therefore, that, under the Federal Constitution, and the interpretation made concerning the powers granted to Congress by the Courts, Congress does possess the authority to prescribe the rate to be charged for services rendered by a common carrier as a Federal Instrumentality.

88 #3. The authority of Congress to delegate the rate making Power to the President:

It would seem to be obvious that if Congress had the power to prescribe a rate for service rendered by a government instrumentality, it possesses the right to prescribe the means by which it shall be determined: Heretofore it has constituted the Interstate Commerce Commission, as a body, to consider the reasonableness of service charges of common carriers in interstate commerce: This body has the power to determine whether a given or proposed rate is reasonable or discriminatory: Under the act of Aug. 10, 1917, Congress has imposed directly additional powers upon such Commission to grant preference on priority in transportation of traffic, and to fix just and reasonable rates for persons or property in carrying out the directions and orders of the President. This power, so given to the Commerce Commission is, of course, not a delegation of legislative power: This power, of course, the Congress could impose upon the President or the Director General, as well as upon the Commission. (Interstate Commerce Commission v. Railway Co., 167 U. S. 479, 42 L. Ed. 243.) In United States v. Grimaud, 221 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, the court said, concerning the delegation of legislative power as follows:

"From the beginning of the Government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for

administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago R. I. & P. R. Co. 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. Rep. 651. Congress provided that after a given date, only cars with drawbars of uniform
89 height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 287, 52 L. Ed. 1064, 28 Sup. Ct. Rep. 616. In Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367; Re Kollock, 165 U. S. 526, 41 L. Ed. 813, 17 Sup. Ct. Rep. 444; Butterfield v. Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. Rep. 349, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

As heretofore discussed the power to prescribe a service charge for a government instrumentality, is not the common law power of determining a reasonable charge: It is the sovereign power to prescribe the charge, or to fix the means of accomplishing the same: It is similar to the power to impose tariff duties: The right to the President to impose a tariff on wheat: It is analogous to the authority granted the President to fix the price of wheat under the food control acts. In fact, under present war measures many similar duties have been imposed or conferred upon the President, viz: Freight rates on vessels,—Act July 18, 1918.

Clearly this power, not a power to legislate a rate, not to determine the reasonableness or discriminatory character of a rate, is a right that may properly be granted, within proper bounds, not transgressing the delegation of a legislative power, to the president. Marshall Field & Co. v. Clark, 143 U. S., 649, 36 L. Ed. 310.

90 #4. Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal Agency for purposes of operation and rate making:

The Act of Aug. 29, 1916 (39 Stat. 645), provides:

"The President in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It is apparent that Congress by this act intended to exercise and did exercise its war power. The paragraph in question was incorporated into the Army Appropriation Act; evidently the enactment was intended to provide for our troops in Mexico and to provide full authority in the President in case of any difficulties with Mexico. Unquestionably, it gave to the President the direct authority in time of war, to take possession, and assume control of the transportation lines involved.

On April 6, 1917, a state of war was formally declared to exist by Congress, between the United States and the Imperial German Government. On Dec. 7th, 1917, Congress authorized and directed the President to employ the entire naval and military resources of the United States, and the other resources of the United States to carry on the war, and to bring the conflict to a successful determination. On Dec. 28th, 1917, the President of the United States, pursuant to the Act of Aug. 29, 1916, and the resolutions of Congress declaring war on Germany and the Austro-Hungarian Government, did take possession and assume control, of transportation lines including the transportation line involved herein, and he expressly directed that the possession, control, operation and utilization of such systems of transportation should be exercised through the Director General. His proclamation further provided that such systems should be utilized for the transferring and transportation of troops, war
91 material and equipment, to the exclusion, so far as may be necessary of all other traffic thereon; that so far as such exclusive use be not necessary or desirable, such systems of transportation should be operated and utilized, in the performance of such other services as the National interests may require, and of the usual and ordinary business and duties of common carriers. The proclamation further provided that:

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Under this proclamation and the authority theretofore conferred, the possession and control of railways, as outlined in the proclamation,

was taken. It can scarcely be contended that the President did not properly determine an urgency and immediate necessity for so doing. By this act of the President the private property of the carriers became subject to the public use required to meet the public necessities then existing. Under this assumption of power the transportation systems passed under governmental operation. There can be little question that then and there they became Federal Instrumentalities to the extent of the purpose for which control and possession of the same were taken. As such, in operation in the manner in which the train should be operated, traffic should be handled, passengers carried, merchandise transported, they became subject to the orders of the Director General and in so far as any statute of any State or of any order of any Railroad Commission of any State served to prescribed otherwise, or was in contravention thereof, the same was subordinated or suspended. These principles obtain not only from the nature of the power conferred upon the Federal Government to carry on war, but also from the reciprocal duty of the States to aid and assist the Federal Government, in times of war, by subordinating every State agency which may serve to interfere with the successful prosecution of the war, and of the enforcement of the war powers. Under this act, providing the assumption of control, there was no attempt to legislate or exercise the rate making power.

92

Under the Act of Mar. 21, 1918, Congress recognised that the President had, in time of war, taken over the possession and use, the control and operation of certain transportation systems: It provided for an annual compensation to the Railway corporations equivalent to their respective average, annual Railway operating income, for the three years, ending June 30, 1917: It provided that Railway operating income accruing during the period of Federal control in excess of such compensation should remain the property of the United States. It further provided that taxes assessed under Federal or any other governmental authority, for the period of Federal control, on the property used under such Federal control, or on the right to operate as a carrier, or on the revenues derived from operation should be paid out of revenues derived from Railway operations while under Federal control excepting that war taxes assessed under the Act of Oct. 3, 1917, or subsequent Acts should be paid by the carrier out of its own funds, and, also assessments for public improvements, or taxes assessed on property under construction. The act also provided that the President might execute any of the powers conferred with relation to Federal control through such agency as he may determine, and that he may fix a reasonable charge for the performance of services in connection therewith, and may avail himself of the advise, assistance and co-operation of the Interstate Commerce Commission: that furthermore, during the period of Federal control, whenever in his opinion the public interests requires, he, the president may initiate rates, fares and charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices

shall not be suspended by the Commission pending final determination. The act further provides that:

93 "Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations or practices, or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal Control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

The Act also provides the sum of five hundred million dollars of Federal monies, which together with the funds available from operating income shall be used as a revolving fund for the purpose of paying the expenses of Federal control, and compensation to carriers, and providing equipment etc., and further that monies and other properties derived from the operation of the carriers during the Federal control are declared to be Federal property. The Act further provides that this Federal control shall continue for, and during the period of the war, and for a reasonable time thereafter, not exceeding one year and nine months after the date of the proclamation by the President of the exchange of ratifications of the Treaty of Peace. It grants, however, to the President the right to relinquish Federal control at any time he should deem such action needful, or desirable. This act is expressly declared to be an emergency declaration enacted to meet conditions growing out of the war.

It is at once seen that this act directly authorizes the exer-
94 cise of the rate making power by the President over transportation lines under Federal control. There can be no question of the intent and purpose of Congress to so do from the very express words of the act. A means and a method is prescribed for

fixing rates to be charged throughout the agency of the President and the established Interstate Commerce Commission.

It may perhaps be contended that the act granting the power to initiate rates and providing that they shall be just and reasonable and subject to review, or consideration by the Interstate Commerce Commission, is drafted analagously to the Interstate Commerce Act creating and defining the powers of the Interstate Commerce Commission in the investigation and determination of the reasonableness of rates in interstate commerce. That such act simply incorporated the common law obligation imposed upon common carriers to make all rates reasonable and just and that the power of the Commission has been confined by the act and by the decisions of the courts to a determination of the reasonableness and the equality of a given rate. That the power to prescribe a rate is a legislative function, the power to determine its reasonableness, a judicial function. That under the Commerce Act the Railways were authorized to initiate rates in interstate commerce, Congress not attempting to prescribe a rate but providing a method for investigating and determining the reasonableness or discriminatory character of the same through the Commission. That, in the act in question, Congress has not attempted to prescribe a rate but has simply transferred from the Railways to the President the power to initiate a rate and has left with the Commerce Commission the power there-fore possessed to determine its reasonableness. That this displays an intent and understanding to apply the same to interstate commerce, alone over which the Commerce Commission alone has jurisdiction. This contention, somewhat plausible from the analagous means used in the Commerce Act and the Act of March 21st, 1918, to initiate and determine
95 rates over common carriers, is to be answered not by a comparison alone of similar language used but through the intent and purpose of the act in connection with the emergency war situation existing and the public needs and demands occasioned thereby.

It does not follow that Congress simply intended to prescribe legislation for initiating rates, applicable only interstate, upon a Federal instrumentality, because it constituted as Board of Review, to act with the President, the Commerce Commission whose powers theretofore were confined to a determination of the common law obligation of common carriers.

The Act of March 21st, 1918, specifically provides for a method of prescribing rates through the action of the President and the Commerce Commission, over common carriers under Federal control. The Commerce Commission are specifically instructed that due consideration be given to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition. They are further directed to take into consideration the certificate of the President, when made, that increased railway operation revenues are necessary, in order to pay the expenses of Federal control and operation fairly chargeable to railway operating expenses and to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment and compensation to the carriers operating as a unit. True, the Commission are authorized to

make findings and orders as are authorized by the amended act to Regulate Commerce. The language employed, in this regard, is not clear. The intent and purpose of the whole act and the object sought to be gained in the war emergency, however, are clear. A Federal instrumentality was created; the control is direct; the revenues received are government property; the appropriations made out of public funds *is* for the public purpose of Federal operation. The persons employed as officers, agents and employees upon such railways are considered employed in the service of the United States. The control of all traffic is directly subject to the orders of the
96 President. It is certainly apparent that these powers conferred upon the President and the Commerce Commission to initiate or review rates upon and over such Federal instrumentalities *is* not the power to initiate or review a rate that must be just and reasonable under the common law obligation of common carrier to passengers, shippers, or to the public.

The intent and purpose of the Director General in this regard is well shown in the preamble to general order No. 28 which reads as follows:

"General Order No. 28."

"Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission under authority of an Act of Congress approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for just compensation of their owners, and for other purposes."

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines, under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passen-

ger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibits' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this 25th day of May, 1918.

W. G. McADOO,
Director General of Railroads."

97 Furthermore, during the continuance of the war, under the Act of Aug. 10th, 1917, heretofore mentioned, powers and duties have been imposed upon the Interstate Commerce Commission, in connection with the war powers of the President, apparently beyond their ordinary powers of determining the reasonableness or equity of rates of common carriers, privately owned and operated.

It is apparent that this act directly authorizes the exercise of the rate making power by the President over Transportation lines under Federal control. A means and a method is prescribed for fixing rates to be charged through the agency of the President and *they* already established Interstate Commerce Commission.

Although the act provides that the rates shall be reasonable and just and although it provides for a method of complaint and review of the same through the Commission, it is evident that this power so conferred upon the President is not the sole power theretofore possessed by the common carriers to initiate a rate that was just and reasonable to the shippers and for the public: The Act from its very provisions, intent and purposes, discloses a purpose to confer a power upon the President to prescribe rates, to be just and reasonable and to be subject to review it is true but, nevertheless an authority, in the operation of a governmental instrumentality, for either of the following purposes: To provide for a deficit in the operating revenues and to secure the Government against loss under its guarantee to the carriers, or, to raise revenues for the Government under the clause which provides that excess revenue shall be Government property.

In either case, the considerations that obtain concerning the common law obligation of carriers to maintain a just and reasonable rate do not apply.

It is also evident that the President through the Director General, pursuant to General Order No. 28, has exercised this specific power granted to him, and for the purposes, in part at least, as above stated: The order has been made applicable to all interstate and intra-state traffic under Federal control: There is no difficulty in understanding the meaning and intent of the order.

98 In our opinion, for the purposes of war, and the legislation enacted to enable the President to perform the high duties of his office, to carry the war to a successful determination, he possessed the specific power and authority to prescribe and make effective the rates promulgated in such General Order.

99 #5. The power of the State to exercise its rate making power over intra-state traffic upon railways under Federal Control:

Sec. 15, of the Act of Congress of March 21st, 1918, provides as follows:

"That nothing in this act shall be construed to amend, repeal, impair or effect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

The State contends that this section expressly reserves to the States its authority concerning the rate making power over intra-state traffic: that it discloses a specific intent on the part of Congress to not inhibit the application of the State laws concerning rates, if the same do not interfere with the Governmental purpose for which the railways were taken: that it shows likewise, *as* specific intent to not interfere with the power of the State in matters of purely local concern within the State, that furthermore the particular use of the term in Sec. 15 "Police regulations" includes and means to include the regulation of rates intra-state. From the foregoing discussion of the principles applicable in the operation of the Railway under Federal control, it is evident that the contentions of the State cannot be upheld. The control, possession and management of the railway systems involved being for governmental purposes, and as a Governmental instrumentality, the power of the State heretofore existing to exercise rate making power, to impose and require reasonable charges for services rendered by a Common carrier performing a public service do not obtain; at least this is so — far as the act prescribes a power, which has been exercised inconsistent with the exercise of such power, likewise by the State. Otherwise, in the act, the specific power is granted to the President to initiate, and prescribe rates upon railways under Federal control in conjunction with the Interstate Commerce Commission. As heretofore stated Congress, under its war powers, had ample authority so to do. It is apparent that Sec. 15, concerning the powers of the State over
100 taxation and lawful police regulation may properly apply to the property of private carriers not devoted to Federal control, under the act, or even may apply to such property so taken under the Federal control except as otherwise the act inhibits the exercise by a State, of power concurrent with that of the President. The State contends that the term, "lawful police regulations," means the exercise of the police power of the State and that this police power of the State cannot be surrendered; Again it is deemed unnecessary to distinguish when a police regulation is the exercise of a police power, and when it is not. It is sufficient to say as heretofore stated, that if the instrumentalities in question are Federal agencies concerning which Congress, and the President has exercised their powers in the control, possession, and operation of the same, the police power of the State does not obtain; otherwise it may.

In Pappen v. United States, (C. C. A.) 252 Fed. 55, the defendants

were convicted of maintaining a House of Ill Fame within five miles of a military fort. Sec. 13 of the Act of May 18, 1917, Ch. 15, authorized the Secretary of war to suppress during the period of war Houses of Ill Fame within such distance from any fort or military camp etc. as he deemed needful. The defendants contended that the violation of the five mile rule as established by the Secretary of War was an invasion of the police powers of the State. The contention was denied, the court holding that Congress having acted under a Constitutional power pursuant to its war powers had full and plenary authority, and that furthermore the act was not a delegation of legislative power to an executive officer. It is inconceivable that at a time when every resource and energy of the nation was absolutely necessary to be devoted to our Federal Government in order to enable it to marshall every resource of man and property to carry on the war successfully, that the State, in the exercise of a so termed police regulation, had the power or the authority to prescribe a rate that might obtain over a Governmental controlled railway between two points in the State, or to
101 assert under its existing laws what merchandise should be carried and when it should be transported, or that it should compel under its existing laws a particular service to passengers or to property that might be detrimental or contrary to the Federal demands. If this authority or power of the State did not exist at times when the war was at its height, it does not exist now unless the emergency situation created by the act of Congress has in fact, passed.

Even though, as contended, it be conceded that the exercise of the rate making power of the State is a lawful police regulation of the State, and as such applicable under Sec. 15, of said Act, to intrastate traffic, nevertheless, such police regulations may well be considered, in view of his proclamation and the terms of the general order issued disclosing and determining an emergency in war times, to exist, to affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Well might the regulatory power of the State concerning rates apply on intra-state traffic. If the President pursuant to the powers granted to him had deemed it unnecessary to initiate or prescribe a rate to apply to railways under such Federal control.

The contention of the State that the provisions of Sec. 10, of such act, which provides that actions may be instituted against the carriers affected by Federal control, and judgment rendered as theretofore provided by law, and that in any such action no defense may be made upon the ground that the carrier is an instrumentality or agency of the Federal Government, show that such systems are not Federal instrumentalities, cannot be upheld. Well might this provision be construed to permit an action at law, or in equity to be maintained as formerly without embarrassment to litigants by the defense of a Governmental agency. The Act itself and the control assumed show in fact, a control by the government for war purposes, and an administration in fact through Government revenues, an operation through Government officials and a rate making power

exercised through Governmental authority. Clearly upon the principles discussed herein the powers of the State over rate making on intra-state traffic does not apply to the transportation line involved herein, if the act, and the purpose for which it was passed are still effective.

102

103 #6. Whether the emergency for which the Congressional Acts were enacted has passed and the powers conferred thereunder are now ineffective:

The State contends that what Congress delegated as a war time necessity has quite another aspect when that emergency has passed. That the war emergency has passed. That President Wilson in an official address on Nov. 11th, 1918, told Congress that the war was in fact concluded; that he then said: "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." That the war has in fact ended: That the armistice accepted by the central powers amounted to an unconditional surrender, and the necessity for government rail control as a war measure has passed away.

Upon the legal issues presented to this court and the showing made therefrom, we are convinced that this contention cannot be upheld: There is no showing made to this court that Governmental operation is not still urgently needed in the demobilization of troops, the maintenance of the armistice terms, the transportation of government materials and supplies, and in the governmental problems involved in the establishment of peace and normal conditions following the actual cessation of hostilities.

The mere fact that an armistice has been declared does not in and of itself determine that the emergency war powers then being exercised pursuant to Congressional authority then cease. Congress in the Act has prescribed a limitation of time, to wit: one year and nine months following the Treaty of Peace, for the exercise of this Federal control: It has recognized therein the necessity of emergency war legislation continuing for a period of time after the termination of the war. In such matters, its discretion, as well as that of the President, is a matter necessarily involved in the plenary war powers conferred upon them concerning which the judiciary will not interfere unless in fact, it is demonstrated by proof, subject to judicial inquiry, that the necessity for the exercise of such war power does not exist.

104 In Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 178, the court said:

"The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it, inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

It therefore follows that the petition of the relator herein should be in all things dismissed. H. A. BRONSON.

105 [Endorsed:] File No. 3722. State ex Rel. Langer, Plaintiff and —, vs. Northern Pacific, Defendant and —. Opinion of Court, by Birdzell, J. Filed in court this 1st day of April, 1919. J. H. Newton, Clerk. Rehearing denied —— —, 191–.

106 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Judgment.

This cause having come on for hearing upon the complaint of the plaintiff and the answers of the Northern Pacific Railway Company and of Walker D. Hines, Director General of Railroads, on Tuesday, the 25th day of February, 1919, and the court having heard argument and duly considered the same, and this day filed its decision in said cause;

It is ordered and adjudged, that the alternative writ of mandamus heretofore issued herein be made absolute, and that the defendants be and they are hereby commanded to desist from collecting any fares, rates or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, except the fares, rates or charges for said services, now on file in the office of the Board of Railroad Commissioners of the State of North Dakota.

Dated this 5th day of April, 1919.

[Seal Supreme Court, State of North Dakota.]

J. H. NEWTON,
Clerk of said Supreme Court.

107 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Assignment of Errors.

Now come the Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, plaintiffs in error, and pray that a writ of error in the above entitled cause may issue to the Supreme Court of the State of North Dakota to review a certain judg-

ment entered in said court on the first day of April, 1919, in favor of the above named plaintiff and against the above named defendants, and assign the following errors in the rendition of said judgment:

1. The court erred in holding that Section 10 of the Act of Congress of March 21, 1918, does not confer on the President original authority to initiate intrastate rates which would supersede preexisting rates prescribed by the State Legislature or other competent authority.

2. The court erred in holding that under Section 15 of the Act of March 21, 1918, preexisting intrastate rates continue in effect as lawful police regulations.

3. The court erred in holding that the term "police regulations," as used in said Section 15, embraces regulations of railroad rates and fares.

4. The court erred in entering judgment in favor of the plaintiff.

Wherefore, plaintiffs in error pray that said judgment be reversed and that the Supreme Court of North Dakota be directed to enter judgment in their favor, quashing the writ of mandamus and dismissing the application therefor.

Dated this 4th day of April, 1919.

CHARLES W. BUNN,
Attorney for Northern Pacific Railway Company.
CHARLES DONNELLY,
Attorney for Walker D. Hines,
as Director General of Railroads.

108 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 5, 1919.

109 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Petition for Writ of Error to the Supreme Court.

The Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, defendants in the above entitled cause, feeling themselves aggrieved by the judgment entered herein on the first day of April, 1919, come now by Charles W. Bunn and Charles Donnelly, their attorneys, and petition said court for an order allowing said defendants to prosecute a writ of error to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and that upon the giving of security in the sum of Five Hundred Dollars, all further proceedings in this court be suspended and stayed until the determination of said

writ of error by the Supreme Court of the United States. And your petitioners will ever pray.

Dated April 4, 1919.

CHARLES W. BUNN,
Attorney for Northern Pacific Railway Company.
CHARLES DONNELLY,
Attorney for Walker D. Hines, as Director General of Railroads.

Allowed.
A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of North Dakota.

110 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

111 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Bond.

Know all men by these presents, that we, the Northern Pacific Railway Company, and Walker D. Hines, Director General of Railroads, as principals, and the National Surety Company of New York, as surety, are held and firmly bound unto the State of North Dakota in the full sum of Five Hundred Dollars ($500.00) to be paid to the said State of North Dakota; to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

Whereas, lately, in a suit pending in the Supreme Court of the State of North Dakota, between the State of North Dakota on the relation of William Langer, Attorney General, as plaintiff, and the Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, as defendants, a judgment was rendered against said defendants, and said defendants having obtained the allowance of a writ of error to reverse said judgment, and filed a copy thereof in the office of the Clerk of said court, and a citation having issued, directed to the said State of North Dakota citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within sixty (60) days from the date thereof;

Now, the condition of the above obligation is such, that if the said defendants shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the

above obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN, *Its Attorney.*
WALKER D. HINES,
As Director General of Railroads,
By CHARLES DONNELLY, *His Attorney.*
NATIONAL SURETY COMPANY,
By D. I. YORK, *Its Attorney in Fact.*

G. E. JOHNSON,
M. FREDERICKSEN,
As to Surety.

The foregoing bond is hereby approved as a supersedeas, this 5th day of April, 1919.

A. M. CHRISTIANSON,
Chief Justice of Supreme Court of North Dakota.

112 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of April A. D. 1919, before me appeared D. I. York, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said D. I. York, acknowledged said instrument to be the free act and deed of said corporation.

G. E. JOHNSON,
Notary Public, Ramsey County, Minnesota.

My commission expires Sept. 24, 1924.

113 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 5, 1919.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, between the State of North Dakota, on the relation of William Langer, Attorney General, plaintiff, and Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, defendants, wherein was drawn in question the validity of an authority

exercised under the United States, and the decision was against its validity, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same in said court at Washington within sixty (60) days from the date hereof; that the record and proceedings aforesaid, being inspected, the Supreme Court may cause further to be done therein to correct that error what *is* right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 7th day of April, in the year of our Lord One Thousand Nine Hundred and Nineteen.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk of the United States District Court
for the District of North Dakota.

[Endorsed:] 3722. Filed in the office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

115 UNITED STATES OF AMERICA, *ss:*

To the State of North Dakota ex rel. William Langer, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Dakota, wherein Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, this 5th day of April, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court
of the State of North Dakota.

Service of the foregoing citation, and the receipt of a copy thereof, admitted this 8th day of April, 1919.

WILLIAM LANGER,
FRANK E. PACKARD,
Attorneys for Defendant in Error.

116 [Endorsed:] 3722. Filed in the office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

117 UNITED STATES OF AMERICA,
Supreme Court of North Dakota, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning same, including the original citation therein.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of North Dakota, at my office in the City of Bismarck, this 8th day of April, 1919.

[Seal Supreme Court, State of North Dakota.]

J. H. NEWTON,
Clerk of the Supreme Court of the State of North Dakota.

Endorsed on cover: File No. 27,062. North Dakota Supreme Court. Term No. 976. Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, plaintiff in error, vs. The State of North Dakota on the relation of William Langer, Attorney General. Filed April 11th, 1919. File No. 27,062.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, AND NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

v.

STATE OF NORTH DAKOTA, EX REL, WILLIAM LANGER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

MOTION TO ADVANCE.

Come now the plaintiffs in error and the defendant in error and jointly move to advance the above entitled cause and to set it for hearing at an early date. For grounds of this motion they show:

This is a writ of error to the Supreme Court of North Dakota (the highest court of that State) to review a final judgment commanding the Director General of Railroads and the Northern Pacific Railway Company to desist from collecting in North Dakota the increased intrastate rates and fares made effective in June, 1918, by an order of the Director General. The case presents the question of the authority of the Director General to increase or to interfere with rates, fares or charges established by State law or by the order of a State regulating tribunal.

The Supreme Court of North Dakota has decided against the authority claimed. Similar suits involving the same question are now pending in the courts of South Dakota, Nebraska, Iowa, Minnesota, and Washington; and other suits of like nature are threatened in various other States of the Union.

The case is one in which the United States are concerned, because the moneys collected under the rates attacked are declared by law to be the property of the United States. Infinite confusion and uncertainty must attend the operation of the railroads by the Government so long as this question remains unsettled, and the State courts assert the right to enjoin the collection by the Director General of rates prescribed by him. The case, therefore, is one of great general public interest, and pursuant to paragraph 5, of the twenty-sixth rule of this court, the Attorney General moves that it be advanced and heard promptly.

ALEX. C. KING,
Solicitor General.
JOHN BARTON PAYNE,
CHARLES DONNELLY,
For the Director General of Railroads.
CHARLES W. BUNN,
For the Northern Pacific Railway Company.
WILLIAM LANGER,
FRANK E. PACKARD,
For defendant in error.

APRIL, 1919.

○

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS,

Plaintiffs in Error.

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

CHARLES W. BUNN,
For Northern Pacific
Railway Company.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, As Director General of Railroads,

Plaintiffs in Error,

vs.

THE STATE OF NORTH DAKOTA, on the Relation of William Langer, Attorney General.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

As the record shows, and as the judgment expressly states (R. 66), this case was heard upon the complaint and the separate answers of the Northern Pacific Railway Company and the Director General of Railroads. The averments of the answers are therefore to be taken as true; indeed

there has not been, nor could there be, any dispute about them, because they set forth only matter which the court knows judicially. They show that from December 28, 1917, to August 1, 1918, the Director General exercised possession and control of the transportation system belonging to the Northern Pacific Railway Company through the officers and agents of that Company, and that after August 1, 1918, he exercised such possession and control through his own officers and agents. Since December 28, 1917, the Northern Pacific Railway Company has had no possession or control of its railroad, nor did it have anything whatsoever to do with putting into force or effect the advanced rates, fares and charges complained of, all of which were filed and published under the sole authority of the Director General.

It is perfectly clear, therefore, that no case is made against the Northern Pacific Railway Company, and as to that Company the complaint should have been dismissed.

CHARLES W. BUNN,
For Northern Pacific Railway Company.

Office Supreme Court, U. S.
FILED
MAY 3 1919
JAMES D. MAHER,
CLERK.

No. 976.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

Brief of the Director General of Railroads

ALEX. C. KING,
Solicitor General;
JOHN BARTON PAYNE,
R. V. FLETCHER,
CHARLES DONNELLY,
For the Director General of Railroads.

SUBJECT INDEX.

	Statement	1
	Assignment of Errors	3
1.	Congress was empowered to vest in President control over intrastate rates	4
2.	Congress did vest such control in him by Section 10	4
3.	Section 15 does not qualify or limit this control	10
4.	Section 15 must be construed so as to harmonize with the other provisions of the Act	17
5.	State regulations limiting the President's right to initiate rates would affect the transportation of troops	23
6.	In case of doubt as to meaning the practical construction of the Executive is controlling	25
	Appendix	27

TABLE OF CASES CITED.

Adams Express Co. v. Croninger, 226 U. S. 491..... 21

B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481.... 21
Beer Co. v. Massachusetts, 97 U. S. 25..... 11

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517..... 11

Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368..... 11

Employers' Liability Cases, 207 U. S. 463..... 6

Heath v. Wallace, 138 U. S. 573.....
Hahn v. U. S., 107 U. S. 402..... 26

Legal Tender Cases, 12 Wall. 457..... 4

Manigault v. Springs, 199 U. S. 473..... 11
Milligan, Ex parte, 4 Wall. 2..... 4
Miller v. U. S., 11 Wall. 268..... 4
Minnesota Rate Cases, 230 U. S. 352..... 4
Minneapolis v. Street Ry. Co., 215 U. S. 417..... 11

Passenger Cases, 7 How. 282..... 10
Pennoyer v. McConnaughy, 140 U. S. 1..... 26
Rodgers v. U. S., 185 U. S. 83..... 18

Shreveport Case, 234 U. S. 342..... 4
Stewart v. Kahn, 11 Wall. 493..... 4

Tarble's Case, 13 Wall. 397..... 4
Trade-Mark Cases, 100 U. S. 82..... 6
Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 21

United States v. Moore, 95 U. S. 760..... 26

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 976.—October Term, 1918.

The Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, Plaintiffs in Error,

vs.

The State of North Dakota, on the Relation of William Langer, Attorney General.

Brief of the Director General of Railroads

STATEMENT.

This is a writ of error to review a judgment of the Supreme Court of North Dakota directing the issuance of a peremptory writ of mandamus commanding the plaintiffs in error to desist from collecting for services wholly within the State any rates, fares or charges other than the fares, rates or charges on file in the office of the State Board of Railroad Commissioners. (R. 66). The following are the facts out of which the case arises:

August 29, 1916, Congress empowered the President in time of war to take possession and assume control of any systems of transportation and to utilize them to the exclusion, if necessary, of all traffic or transportation other than that of troops, war material or equipment (39 Stat. 645).

April 6, 1917, Congress duly resolved that a state of war existed between the United States and the Imper-

ial German Government, (40 Stat. 1), and on December 7, 1917, war was declared with Austria (40 Stat. 429).

December 26, 1917, the President, proceeding under the authority of the Act of August 29, 1916, took possession and assumed control of all systems of transportation within the boundaries of the United States, including the Northern Pacific Railroad.

March 21, 1918, an act known as the "Federal Control Act" (40 Stat. 451) was approved, providing for the operation of the systems of transportation thus taken over, and for the compensation of their owners.*

March 29, 1918, the President, by a further proclamation (R. 12)), empowered William G. McAdoo, Director General of Railroads, either personally or through such agencies as he might appoint, to exercise the powers and to do the things which the President had been authorized to do.

May 25, 1918, the Director General of Railroads made his General Order No. 28 (R. 14), directing that rates and passenger fares be increased; and pursuant to this order the increased rates and fares of which complaint is made were duly published and filed with the Interstate Commerce Commission. They were not filed with the Board of Railroad Commissioners of North Dakota (except for purposes of information), and the laws of that State regulating the procedure to be followed by common carriers in increasing rates, fares and charges were not observed.

February 14, 1919, the Attorney General of North Dakota commenced this proceeding in the Supreme Court of North Dakota against the Director General of Railroads and the Northern Pacific Railway Com-

*For the convenience of the court, copies of the material part of the Act of August 29, 1916, and of the whole of the President's proclamation of December 26, 1917, and the Act of March 21, 1918, are appended to this brief.

pany, and asked that they be enjoined from continuing in effect the rates published pursuant to the Director General's order (R. 10). Separate answers were filed by the defendants, setting forth in substance the facts above stated (R. 11-17). The case was heard on complaint and answers February 25, 1919. April 1, 1919, the court rendered its decision upon which was entered the judgment which this writ of error brings under review (R. 20-33). A separate concurring opinion was filed by Mr. Justice Robinson (R. 34-36). Two of the five justices of the court dissented (R. 37-65).

ASSIGNMENT OF ERRORS.

1. The court erred in holding that Section 10 of the Act of Congress of March 21, 1918, does not confer on the President authority to initiate intrastate rates superseding pre-existing rates prescribed by state authority.

2. The court erred in holding that under Section 15 of the Act of March 21, 1918, pre-existing intrastate rates remained in effect as lawful police regulations.

3. The court erred in holding that the term "police regulations", as used in Section 15, embraces regulation of railroad rates and fares.

4. The court erred in entering judgment in favor of the plaintiff.

ARGUMENT.

1. Congress was empowered by the Constitution to vest in the President or in the Interstate Commerce Commission control over intrastate rates and fares.

The court below concedes this proposition (R. 25), and counsel for the defendant in error concede it. It is unncessary, therefore, to do more than point out that Congress might have done this either (a) under its war powers (Art. 1, Sec. 8, pars. 11, 12, 13, 14), *Ex parte Milligan,* 4 Wall. 2, 139; *Miller* v. *United States,* 11 Wall. 268, 304; *Stewart* v. *Kahn,* 11 Wall. 493, 506; *Legal Tender Cases,* 12 Wall. 457, 539; *Tarble's case,* 13 Wall. 397, 408; 2 *Story on the Constitution,* sec. 1183; or, (b), under its power to regulate commerce among the several states (Art. 1, Sec. 8, par. 3), *Minnesota Rate Cases,* 230 U. S. 352, 399, *Shreveport case,* 234 U. S. 342, 351.

2. By the Acts of August 29, 1916, and March 21, 1918, the President was given control over all traffic, state and interstate, and was empowered to initiate rates, fares and charges by filing them with the Interstate Commerce Commission.

So complete was the control given to the President "in time of war" over systems of transportation by the Act of August 29, 1916, that he was authorized to utilize them for the transportation of troops, war material, etc., "*to the exclusion,* as far as may be necessary, of all other traffic thereon." Possessing authority *to exclude* all other traffic, state or interstate, he could, of course, say what should be charged for

moving it. This authority, it will be observed, was continued in effect by section 9 of the Act of March 21, 1918, which provides, in addition, that,

> "The President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Again, section 10 of the Act of March 21, 1918, gives the President express authority during Federal control to initiate rates and fares by filing them with the Interstate Commerce Commission; and that Commission upon complaint is empowered to enter upon a hearing concerning the justness and reasonableness of "said rates and fares." This authority covers *all* rates and fares. It is not limited to interstate rates or fares, nor can any reason be suggested why it should be so limited. Every consideration which could prompt the President to increase interstate rates must, of course, prompt him to increase those applying wholly within a state; indeed, discrimination must inevitably result if there were an increase of the one class without a corresponding increase of the other. Congress by section 10 did indisputably give him power to increase interstate rates and deprived the Interstate Commerce Commission of the power to suspend them; the State does not and cannot deny this. Yet its argument is that though the law was, as expressly declared in its last section, "emergency legislation" enacted by Congress in time of war, under its war powers, and designed to vest in the Commander in Chief authority commensurate with his duties and responsibilities, it yet left him a helpless petitioner before forty-eight independent state tribunals for the permission neces-

sary to make his action effective and lawful.

The authorities are directly opposed to any such narrowing of the plain meaning of the language used. In the first *Employers' Liability Cases,* 207 U. S. 463, 500, this court considered an act of Congress giving to "any employee" of a carrier engaged in interstate commerce a right to recover damages resulting from the negligence of a fellow servant. Its constitutionality was questioned upon the ground that by its terms it was broad enough to apply to an employe engaged wholly in intrastate commerce; and it was argued that *to save the act* the words "any employe" must be held to mean only employes engaged in interstate commerce. This court said:

> "So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employe' as found in the statute should be held to mean any employe when such employe is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it."

In the *Trade-Mark cases,* 100 U. S. 82, 98, this court, in dealing with the general language of the act of Congress there under consideration, said:

> "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objec-

> tions: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

It is to be observed that in both these cases the court refused to narrow the meaning of language even to save the constitutionality of an act of Congress. *A fortiori,* it will give general language its natural meaning when the constitutionality of the statute is not at stake, and when the only effect of doing otherwise would be to strike down the action of the Executive, taken in time of war, in the exercise of what is conceded to have been an honest, even if erroneous judgment.

Moreover, the power thus given to the President by section 10 to initiate "rates, fares, charges, classifications, regulations, and practices" must be considered in the light of the purpose for which he was to initiate them, and the manner in which the properties were to be operated, as shown by that section. It was recognized that to pay increased expenses, taxes, and compensation to the companies he would probably be obliged to increase rates; and it was provided that if complaint should be made to the Interstate Commerce Commission regarding them consideration must be given to his certificate that he had in fact been obliged

to do so. The properties, it was said, were to be operated "as a unit", and "under a *unified* and co-ordinated *national* control." How could they be so operated if subject to the regulation of the various States, as to a considerable part of their traffic? And how was the President to proceed to get the needed additional revenue? Was he to make a segregation between interstate expenses and returns, and intrastate expenses and returns, along the lines pursued in the various rate cases with which the Court is familiar? Such segregations, while theoretically possible, are essentially impracticable, and as this Court must have come to realize are of little value when made. But if we accept the theory that it was the duty of the President to deal with each state as to the rates within the state and to deal with the Interstate Commerce Commission only as to the interstate rates, such a view must proceed upon the idea that there is a practical basis for segregation. If this is true it must follow that the President ought to have made a separate study of all the intrastate operations so as to decide how the increased burden should be divided. If the President had undertaken to do this it would probably have been 1924 or 1925 before he could have reached a conclusion.

Surely it is not credible that Congress in providing a method to meet a *war emergency,* intended any such result.

It is said, however, that the very language of section 10 shows that it was never intended to apply to intrastate rates, because it authorizes the Commission on complaint to make only "such findings and orders as are authorized by the Federal Act to Regulate Commerce", and to enforce them as provided in that Act.

The argument is that the orders and findings authorized by the Act to Regulate Commerce are only such as relate to interstate traffic; and as these are all the Commission is authorized to make, no provision is made for dealing with cases involving intrastate rates, and it is therefore clear Congress was not legislating with reference to them.

This argument utterly misconceives the scope and purpose of the language in question. That language authorizes the Commission to make "*such*" findings and orders as the Act to Regulate Commerce authorizes. Now, what orders and findings does that Act authorize? It authorizes findings as to whether rates under attack are unjust or unreasonable; as to whether they are unduly discriminatory or unduly preferential; as to what will be proper rates to substitute therefor; as to whether practices of the carriers are proper; as to whether a claimant has suffered damage and is entitled to reparation; and it authorizes orders giving effect to its findings, and in certain cases,—as where the order requires the payment of money,—proceedings in court to enforce them. Congress might have enumerated specifically each of the findings and orders described in the Act to Regulate Commerce which it was empowering the Commission to make; but it wished to avoid circumlocution. It was enacting emergency legislation dealing with temporary conditions. The machinery already provided by the Interstate Commerce Act was adequate to any case involving a complaint as to rates, and therefore it authorized the Commission, in dealing with any case involving rates, whether state or interstate, to make findings and orders *such as* (i. e., *of the character of*) those authorized by that Act.

Far from telling against the construction for which we contend, the language here in question tells dis-

tinctly in its favor. Had section 10 been concerned alone with interstate rates and fares, there would have been no point in giving to the Commission authority, when such rates were attacked, to make such findings and orders as the Interstate Commerce Act authorized. *The Commission had that authority already.* The very purpose of the language was to give it like authority in cases of a character which it had not previously been authorized to consider.

3. Section 15 of the Act of March 21, 1918, does not limit or qualify the power given by Section 10 to initiate rates.

The case of the State rests entirely upon an affirmation of what the foregoing proposition denies. The State contends that in preserving unimpaired its "lawful police regulations" Congress restricted to interstate commerce the authority given by section 10 to initiate rates; or, stated differently, that this language in section 15 proves that section 10 was not intended to have the broad effect now claimed for it. The argument is that laws relating to the regulation of rates and fares are "police regulations" and that these are not preserved unimpaired if the President is given authority to disregard them.

Taking the term "police power" in its broad sense, it is undoubtedly true that laws regulating rates and fares may properly be referred to that power; but in its broad sense almost every legislative enactment might be referred to it. As said in Mr. Justice Wayne's opinion in the *Passenger Cases,* 7 Howard 282, 423:

> "Police powers and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of a sovereign."

It is not in this broad sense that the term is commonly used. In its ordinary sense it is taken "to extend to the protection of the lives, health and property of the citizen and to the preservation of good order and the public morals." *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33. It is a power which cannot be bargained away, *Beer Co.* v. *Massachusetts, supra,* and by that very fact the rate-regulating power falls outside it, for that power may be and frequently is bargained away. *Detroit* v. *Dertoit Citizens' Street Ry.,* 184 U. S. 368; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517; *Minneapolis* v. *Street Ry. Co.,* 215 U. S. 417.

In *Manigault* v. *Springs,* 199 U. S. 473, 481, this court said:

> "It only remains to consider, in connection with this branch of the case whether the act of the General Assembly of 1903 was a proper exercise of the *police power* of the States. Of this we have no doubt. Although it was not an exercise of *that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community,* it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation."

In his work on *Police Power,* Freund says, at section 10 (Edition of 1904):

> "The exercise of the police power for the protection, safety, order and morals, constitutes the police power in the *primary* or *narrower sense* of the term. It is a power so vital to the community

> that it is often conceded to local authorities of limited power. It is a police power in this narrower sense of the term which the Supreme Court of the United States concedes on principle to the States, even where its exercise affects interstate and foreign commerce."

Moreover it is to be observed that it is not the "police power" of the States that section 15 preserves unimpaired, but only their "lawful police regulations."

The real extent of the limitation imposed by section 15 will appear more clearly if that limitation is placed in juxtaposition with the other material provisions of the Acts of August 29, 1916, and of March 21, 1918. Those provisions, taken together, would read as follows:

> "The President in time of war is empowered to take possession and assume control of any systems of transportation and utilize the same for the transfer or transportation of troops, war material and equipment or for such other purposes connected with the emergency as may be needful or desirable, to the exclusion as far as may be necessary of all other traffic thereon. He may initiate rates, fares and charges by filing the same with the Interstate Commerce Commission, and they shall not be suspended by the Commission pending final determination; but the lawful police regulations of the several states shall not be impaired or affected."

This, we submit, expresses accurately the material provisions of the Act of August 29, 1916, and of sections 9, 10 and 15 of the Act of March 21, 1918. These provisions mean what they would have meant had they been stated in the foregoing order; but had they been

so stated surely no one would deny that they authorized the President to initiate rates and fares applicable to intrastate traffic by filing them with the Interstate Commerce Commission.

But it is said that the exception to section 15 proves that the term "lawful police regulations" was used in the broad sense; because that section, after preserving unimpaired to the states their "existing laws or powers in relation to taxation" and their "lawful police regulations", specifically excepts any situation where "such laws, powers or regulations may affect the transportation of troops, war materials, government supplies, *or the issue of stocks and bonds.*" The argument is that a law regulating the issue of stocks and bonds would not commonly be called a "police regulation" in the primary sense of that term; and the very fact that Congress made an exception of such a law shows that it used the term, not in the primary or narrow, but in the broad sense, for it would not have excepted such laws from the term if the term did not include them.

Now it is not accurate to say that such laws are not police laws or regulations in the primary sense of the term. The so-called "Blue-Sky" Laws are police laws in the strictest sense, as directed against fraud. But it is unncessary to rely on this. The argument assumes that the exception relating to the issue of stocks and bonds was an exception out of the "lawful police regulations" which had been preserved unimpaired. It was nothing of the kind. Explicit and unqualified power over the issuance of such securities had been given to the President by section 7 of the Act; and probably no one would contend in the face of that section that the preservation unimpaired of

"lawful police regulations" would affect the powers there given; but many States, as the court knows judicially, have laws imposing *taxes* upon the issuance of stocks and bonds by carriers; and as the first part of section 15 preserves unimpaired "existing laws or powers of the States in relation to *taxation,*" it was of the highest importance to make it clear that neither by any existing tax law nor by the exercise of any existing tax power could a tax be placed upon the issue of such stocks and bonds as the President might think necessary to authorize during the emergency. Obviously, it was upon the clause preserving State tax laws that this exception was intended to operate.

It is said, however, that the history of section 15 in its passage through both Houses proves that Congress intended by that section to preserve unimpaired the State's power of rate regulation. This argument rests upon the fact that the bills dealing with this subject which passed the Senate and House, while generally alike, had numerous points of difference in detail, and were therefore referred to a Conference Committee. The House Bill, as thus referred, provided, that "nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein those regulations may affect the transportation of troops, war materials or government supplies, *the regulation of rates, the expenditures of revenues, the addition to or improvement of properties,* or the issue of stocks and bonds." The Conference Committee struck out the italicized words, and the remainder was reported with slight changes as the present section 15, and adopted with the rest of the bill. No explanation what-

soever was made by the Conferees of their purpose in eliminating these phrases. The hearings before Committees, and the observations of members in the course of the progress of the bill show that it was the purpose and aim of those who advocated the adoption of the provisions of section 10 to vest in the President primary control of *all* rates, state and interstate.*

The argument of the State, then, is drawn not from anything that is said in the Conference report, but from the action of the Conferees. That argument rests wholly upon the dropping out of the words "the regulation of rates". With those words in the section, it is said, it would have been plain that the President was vested with control over intrastate rates; and although the Conference Committee did not say so, their only purpose in eliminating them *must have been* to deprive him of such control.

But this argument begs the question. If the term "police regulations" was used in its primary sense good draughtmanship would have suggested their elimination, as being altogether redundant. And besides if we are to speculate as to motives or purposes (and we are in fact entirely in the realm of speculation, nothing having been said on the subject in the report) we must bear in mind that it is not so much a question what the Conferees intended by their action as what the Senators and Representatives believed to have been accomplished by it; and considering the whole purpose of the legislation, is it supposable that any Member of Congress believed that so important and necessary a power had been withdrawn from the President by the elimination, without a word of explanation, of a single phrase?

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*See for instance, "Hearings before House Committee, pp. 74, 578, 582, 619, 756; Congressional Record, Vol. 56, pp. 2636, 2637, 2684, 1934, 2569."

It is perfectly apparent, moreover, that this argument proves too much. The words "the regulation of rates" were not the only words eliminated by the Conference from the new section 15. There were eliminated as well the words "the expenditure of revenues, the addition to or improvement of properties." Now if by elimination of the words "the regulation of rates" the President became subjected to State authority in the matter of regulating rates, then by the elimination of the other words he became subjected to State authority in the matter of expenditures of revenues and in the matter of additions to and improvements of properties. Does not this reduce the contention to an absurdity? Is it thinkable that, with the nation at war, the President was obliged to consult State laws to ascertain whether he was within his rights in expending revenues derived from railroad operations? Or that he was to get the authority of the State Commissions before he could make additions and improvements necessitated by the war emergency, when Section 6 of the act not only gave him the fullest authority to make them, but appropriated half a billion of dollars with which to pay for them?

Again, if all State police regulations in the broad sense were to be observed, it is not alone in the matter of rate regulations that the President has been at fault. How about State laws forbidding consolidation of parallel and competing lines? These certainly are police regulations in the broad sense. He has disregarded them. Was he bound to observe them? He thought he was not, for he was told by the Act that "a *unified* and co-ordinated *national* control" was provided for. Unification and co-ordination and nationalization of the railroads were the primary objects sought to be obtained; and can anything be more absurd than to suppose that Congress meant to undo its

own work, and by its use of the term "police regulations" in section 15 to defeat the very purpose for which the law was enacted?

4. Section 15, as construed by the court below, is repugnant not only to the specific provisions of Section 10, but as well to the whole spirit of the Federal Control Act. It must be construed so as to harmonize with those provisions and with that spirit.

(a) That it is opposed to the specific provisions of Section 10 is apparent at once. That section tells the President that by filing them with the Interstate Commerce Commission he may initiate rates which the Commission shall be powerless to suspend pending final determination; and this, as we have seen, within the principles of statutory construction which this court has laid down, means *all* rates, state as well as interstate. Section 15, on the other hand, as construed by the court below, directly negatives this and tells him that as to traffic moving locally within each of the forty-eight States, he may not initiate rates in this way, but must observe existing state regulations. But the language of Section 10 is specific; it deals directly with the subject in hand, namely, rates, and tells the President how he may initiate them. The language of Section 15, out of which the court below spells a prohibition against this, is general. It is not an express statement that he may not initiate those intrastate rates, which Section 10 says he may. It is a mere general statement that those exceedingly vague things called "lawful police regulations" are to remain unimpaired. We have, then, a case for the application

of the recognized rule of statutory construction, that specific provisions of a statute will control general provisions either of a later statute or of the same statute, with which they appear to be in conflict. In *Rodgers* v. *United States*, 185 U. S. 83, 87, this court reviewed the authorities on this question, saying:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general —the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

The authorities which the court goes on to cite show that the same doctrine is applicable to inconsistent provisions of the same statute.

(b) The Federal Control Act, as expressly declared in its 16th section, was "*emergency* legislation enacted to meet conditions growing out of the war." Together with the Act of August 29, 1916 (which by its 9th section it continued in effect), it empowered the President "to utilize" the transportation systems of the country "*to the exclusion,*" if necessary, of all other traffic thereon. He was so to utilize them to meet the conditions of a war concerning which, in the public statement accompanying the proclamation by which they were taken under control, he used this language:

> "This is a war of resources, no less than of men, perhaps even more than of men, and it is necessary, for the complete mobilization of our resources that the transportation systems of the country should be organized and employed *under a single authority* and a simplified method of coordination which have not proved possible under private management and control."

With the same thought in mind, and realizing the nature of the emergency in which he must act, he provided in the proclamation itself that,

> "Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. *But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.*"

To the same end (and as it would seem with this very language in mind), Congress by the Federal Control Act gave to the President the right to initiate rates, took from the Interstate Commerce Commission any power which it had to suspend them, brought all railroads, even the short lines (many of which were not engaged in interstate commerce at all), under the President's control, provided that they should be operated "as a unit" and "under a *unified* and coordinated *national* control," and that when the Interstate Commerce Commission came to consider the reasonableness of any rates which the President might make it should bear in mind that they were so oper-

ated, and should consider his certificate that it was necessary to increase revenues from their operation. This court knows from the cases which it has considered and decided in recent years, how great are the difficulties of distinguishing—how practically impossible it is to distinguish—interstate from intrastate commerce. It knows of the conflicts that arise whenever an attempt is made to increase rates applicable to the one class of commerce without at the same time increasing those applicable to the other. It knows that as a practical matter any attempt of the President to make railroad traffic yield adequate revenues would be not only manifestly unjust, but utterly abortive, if made with reference to interstate traffic alone. It knows that if the right to increase intrastate rates and fares was dependent upon the consent of the state regulating bodies, not only must the process be tedious and ill-adapted to a war emergency, but, as to many of the rates and fares, the consent could not be obtained at all, because in many of the states the rates and fares are fixed by statutes which the regulating Commissions are powerless to change. It is not credible that Congress in dealing with such a situation, and with so full a realization of its necessities, intended while vesting in the President so full a measure of power on one side, to leave him helpless on the other.

We say, then, that to construe Section 15 as forbidding interference with state rates except through the observance of the rigid formalities adapted to times of peace, is to construe the Act as rendering the President impotent in the very field in which by its whole spirit and purpose it professed to enlarge his powers. It is to construe it as giving power in one section and withdrawing it in another; as providing for a "uni-

fied and coordinated national control" and then subjecting that control to the diversified judgments and tedious procedure of the regulating tribunals and legislatures of forty-eight states; as depriving the Interstate Commerce Commission of its powers, and leaving the states in full possession of theirs; as professing to deal with a war emergency, and yet subjecting the President to the restraints proper to times of peace. Such a construction of the Act gives rise to the plainest repugnancy; and even if the language of Section 15, instead of being general, had been specific, it would be the duty of the court to harmonize it with the other provisions of the Act and with the spirit which pervades that Act as a whole. Three recent and well known decisions of this court afford striking illustrations of the application of this principle. We refer to *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

In the *Abilene case* the court considered the meaning of the 9th section of the Act to Regulate Commerce. That section in the broadest language gave to "any person or persons claiming to be damaged" by a common carrier the right to proceed either in court or before the Commission to recover such damages; and the Abilene Company, relying on this section and without appealing to the Commission to say whether the rates in question were unreasonable, commenced an action in court to recover damages claimed to have been suffered by reason of the exaction of unreasonable rates. The court held that such an action could not be maintained; and answering the contention that section 9 expressly gave the right to maintain it, it said: (p. 441)

> "True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible."

In the *Pitcairn case* the court considered the meaning of Section 23 of the Act to Regulate Commerce. That section authorizes the commencement of mandamus proceedings in the most explicit language. The Pitcairn Coal Company, relying on this language and without a previous submission of the question to the Interstate Commerce Commission, began a proceeding in mandamus against the Baltimore & Ohio Railroad Company to compel delivery to it of a number of cars. The court held that the action could not be maintained. It said:

> "It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889."

In the *Crominger case* the court considered the meaning of the proviso to the Carmack Amendment, to the effect that "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under ex-

isting law." Relying upon this language, Croninger sought to enforce a right which "he had under the existing law" of the State of Kentucky. The court held that he could not do so; that his right under the Act to Regulate Commerce was exclusive; and though the proviso had in express terms preserved to shippers their rights of action under existing law, this proviso must be construed in the light of the whole purpose of the Act. The court said:

> "To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing *Federal* law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing *state* laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

5. Any state regulation limiting the President's right to initiate rates and fares would affect the transportation of troops, war materials and government supplies.

Even if a state law regulating rates is a "lawful police regulation" within the meaning of section 15, the President, by the very terms of that section, was relieved from the necessity of observing it if its observ-

ance would affect the transportation of troops, war materials or government supplies. Is it certain that such a law would *not* have that effect; or, to put it on the lowest ground, is it *so* certain as to justify a court at this day, when the crisis is past, in undoing what the President then did? He was in charge of the transportation systems of the country. He had to operate them; and the consideration of the first importance was, of course, to utilize them in the movement of troops and war material. He could not in such an exigency allow their operation to cease through the disaffection or strikes of employes. This court knows judicially that on the very day when the Director General issued Order No. 28, increasing railroad rates, he issued as well Order No. 27, increasing by several hundred millions of dollars annually the wages of railroad employes. The money to meet this added charge must come from some source; it was proper that it should come from the shippers and passengers for whom, for the most part, it was incurred; and it was proper, indeed it was necessary, that in distributing the burden interstate shippers and passengers should not be discriminated against. Confronted with this situation the President might well have said: "These state laws which require me, at such a time, to observe all the formalities of a procedure adapted to times of peace, in order to get that financial assistance which to be effective must be obtained promptly, are a real hindrance to the effective prosecution of the war, and their observance would affect the movement of troops and war materials." And if in the exercise of his executive discretion he took this view, is it the function of a court now to say that he was wrong?

6. Any doubt as to the meaning of the law will be resolved in favor of the Executive's practical construction of it.

It is to be remembered that the action complained of was not that of a railroad corporation. These rates and fares were not increased by the Northern Pacific Railway Company. They were increased by the President of the United States, in time of war, at a critical period in the history of the nation and of the world, and in the exercise of what *he believed* to be authority duly vested in him by Congress. No one questions or would dream of questioning his good faith; on one would think of suggesting that in what he did he or those through whom he acted had any ulterior or unworthy ends to serve. He acted with absolute impartiality. He imposed upon the commerce of North Dakota no burden not placed equally upon the commerce of every other part of the nation. His authority to do this was not then challenged. North Dakota, like every other state in the nation, acquiesced in and recognized it; and from the intrastate rates thus established and assented to many millions of dollars, as the answer shows (R. 15) have been collected and disbursed by the United States Government. We have, then, the disinterested, practical construction placed upon a law by those whose duty it was to adiminister it, and acquiesced in by the very parties who now challenge it. Unless that construction was clearly erroneous the courts will sustain it. Authorities in support of this proposition might be multiplied indefinitely. We cite only two or three of them.

In *Heath* v. *Wallace* 138 U. S. 573, 582, the court said:

> "Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

In *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 23, the court said:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

See also, *Hahn* v. *United States,* 107 U. S. 402; *United States* v. *Moore,* 95 U. S. 760.

Respectfully submitted,

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